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## The Privilege Doctrines--Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?

Christine Hatfield  
*Pace University School of Law*

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# Comment

## **The Privilege Doctrines—Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?**

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## I. Introduction

In the American judicial system, there exists a tension "between the secrecy required to effectuate the [attorney-client] privilege and the openness demanded by the factfinding process"<sup>1</sup> "[i]nasmuch as '[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence.'"<sup>2</sup> While the liberal access to information provided by the discovery provisions of the Federal Rules of Civil Procedure are intended to bring forth the truth, a skillful or well equipped litigant can use those rules as

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1. John Sexton, *A Post-Upjohn Consideration of Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 446 (1982).

2. See *Linde Thomson Langworthy Kohn & VanDyke v. RTC*, 5 F.3d 1508, 1514 (D.C. Cir. 1993) (quoting *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (citation omitted)).

a blunt weapon to bludgeon his opponent into submission, a result that does anything but serve to expose the truth of a matter.<sup>3</sup>

Major corporations,<sup>4</sup> like those comprising the tobacco industry, involved in complex tort or product liability litigations have tremendous incentive to withhold information; this incentive is directly proportional to the damages available to successful plaintiffs in those actions.<sup>5</sup> Typically in such cases, the defendant is a tobacco company with greater wealth, expertise and resources than the plaintiffs, who are typically individuals or, at most, a class of individuals all seeking redress for a similar wrong.<sup>6</sup> The defendant in these cases also has exclusive possession of almost all of the information necessary for the just adjudication of the claims filed against it, forcing the plaintiff to rely on the defendant's good-faith compliance with the discovery rules in order to prove her claims.<sup>7</sup>

Consequently, over the past twenty years, discovery abuse has become a standard defense tactic in litigating many of the most complex tort and product liability cases. In particular, the tobacco industry has developed several evasion strategies of choice, including, but not limited to, delay, inundating an opponent with reams of useless information, use of the court system to wage a war of motions and protective orders against an adverse party, as well as filing patently false and misleading responses to discovery requests.<sup>8</sup> Every strategy is designed to force the massive expenditure of frequently scarce plaintiff's resources in order to sort out the data provided or fight for the enforcement of discovery orders.<sup>9</sup> The net result of these strate-

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3. See FRANCIS H. HARE, JR. ET AL., *FULL DISCLOSURE* 65-66 (1994) [hereinafter HARE]; see also Frank F. Flegal, *Discovery Abuse: Causes, Effects & Reform*, 3 REV. LITIG. 1 (1982) [hereinafter Flegal].

4. A short list of the corporations employing these types of abusive strategies in order to try and make an action "go away" include the Suzuki Motor Company, the Ford Motor Company, General Motors, Occidental Petroleum, A.H. Robins Company, Colt Industries, Upjohn Company, as well as the defendants in the asbestos litigations of the 1980s. See *infra* notes 37, 39-40, 45, 50, 60, 65, 257 and accompanying text.

5. See *infra* notes 72, 74 and accompanying text.

6. See *infra* notes 55, 69 and accompanying text.

7. See *infra* notes 35-36 and accompanying text.

8. See *infra* part II.A.

9. *Id.*

gies is obstruction of the process of determining the truth of a matter and prevention of fair and impartial justice.

This Comment will analyze the tobacco companies' use of the privilege doctrines to avoid litigation over the past thirty years, specifically focusing on the last fifteen years of litigation between this industry and its accusers. Part II of this Comment will discuss the pertinent discovery rules and the manner in which they are abused. Part III will examine the development, scope and limitations of the attorney-client privilege and work product doctrines, considering with particularity the corporate context and the applicability of the crime-fraud exception to these doctrines. Part IV will review the case law of the tobacco litigation, focusing on the use and abuse of the attorney-client privilege and work product doctrine. Part V of this Comment will analyze the abuse of the privileges by the tobacco industry lawyers as a means to evade disclosure during discovery. Part VI will conclude that this type of abuse is prevalent, but very much at the mercy of the courts.

## II. Development of the Discovery Rules

The Federal Rules of Civil Procedure ("FRCP"), as adopted in 1938,<sup>10</sup> included a set of rules governing discovery.<sup>11</sup> These rules were adopted on the premise that access to information by both parties in litigation is necessary to "promote the just, speedy and inexpensive determination of [the] action . . . ."<sup>12</sup>

FRCP 26(b)(1) defines the permissible scope of discovery, allowing "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."<sup>13</sup> The courts have given the discovery rules liberal construction.<sup>14</sup> Under the amended rules, Rule 26(a) mandates certain automatic disclosures of witnesses and evidence, yet is self

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10. FED. R. CIV. P. The discovery rules have subsequently been amended in 1970, 1980, 1983 and again in 1993 shifting the approach from discovery to automatic disclosure.

11. FED. R. CIV. P. 26-37. The discovery rules include interrogatories 33(c); requests for production 34(a); and requests for admissions 36(a). *Id.*

12. *Perry v. Creech Coal Co.*, 55 F. Supp. 998, 1000 (D.C. Ky. 1944).

13. FED. R. CIV. P. 26(b)(1).

14. *See Hickman v. Taylor*, 329 U.S. 495, 506 (1947). In giving the federal discovery rules such broad treatment "either party may compel the other to disclose whatever facts he has in his possession." *Id.* at 507. *See generally* 8

limiting by deferring to local rules, allowing individual courts to opt out.<sup>15</sup> Such mandated voluntary disclosure is limited to documents “relevant to disputed facts alleged with particularity in the pleadings,” so the defendant’s disclosure often results in production of information already known to the plaintiff<sup>16</sup> and the overproduction of irrelevant documents—a strategy referred to as “dump truck and shuffled deck stonewalling tactics.”<sup>17</sup> Rule 26(b) also authorizes the court to limit discovery where “the burden or expense of the proposed discovery outweigh its likely benefit.”<sup>18</sup> Should the court determine that the information requested is “obtainable from some other source that is more convenient, less burdensome or less expensive,” Rule 26(b)(2) authorizes such limitation by the court.<sup>19</sup>

Rule 37(a)(3) specifically provides that “an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer or respond.”<sup>20</sup> The rules impose an affirmative duty on the responding attorney to make a “reasonable inquiry” into whether a disclosure in response to a discovery request is as “complete and correct” as practicable.<sup>21</sup> The courts have required corporate parties to conduct rather extensive research<sup>22</sup> to produce relevant materials in their “possession, custody or control.”<sup>23</sup> Such control does not require legal ownership of the materials, only a legal right to information or regular access in one’s usual course of business.<sup>24</sup> Production

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CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2001, 2007, 2008 (1994) [hereinafter WRIGHT].

15. FED. R. CIV. P. 26(a)(4) (1993).

16. *Id.* See also HARE, *supra* note 3, at 68 (quoting 1993 Amendments, FED. R. CIV. P. 26(a)).

17. See *infra* text accompanying note 42.

18. FED. R. CIV. P. 26(b) (1993).

19. FED. R. CIV. P. 26(b)(2).

20. FED. R. CIV. P. 37(a)(3).

21. FED. R. CIV. P. 26(g). A litigant or his attorney is required to sign discovery responses, certifying that he or she has read the response and after a reasonable inquiry believes all available information was provided. *Id.*

22. See *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73 (D. Mass. 1976); *Morgan Smith Automotive Prods., Inc. v. General Motors Corp.*, 54 F.R.D. 19 (E.D. Pa. 1971). See also HARE, *supra* note 3, at 30-31 (where parties are required to inquire of employees, present and former, for information).

23. FED. R. CIV. P. 34(a).

24. See *infra* part III.C. See also HARE, *supra* note 3, at 38-40. Parties have been held to have such “control” over documents where they were given to attorneys or maintained by employed experts on investigations. *Id.* at 31.

may be compelled where the documents are located at other branches or remote subsidiaries of a corporation, even if the documents reside outside of the court's jurisdiction.<sup>25</sup>

If the party should learn that in some material respect the information disclosed is incomplete or incorrect, Rule 26(e) imposes a continuing duty on a party to supplement its discovery responses in order to prevent a knowing concealment.<sup>26</sup> Further, Rule 37(c)(1) imposes a sanction upon any party who fails to disclose the information required by Rules 26(a) or 26(e), by prohibiting the use of that information at trial.<sup>27</sup>

In the face of any attempts to limit the scope of discovery, there remains a presumption in favor of allowing discovery, but limits do exist.<sup>28</sup> Rule 26(b)(1) specifically excludes privileged matters from discovery,<sup>29</sup> but the party asserting any privilege from discovery has a heavy burden of proof to describe the nature of the confidential communications in a manner which demonstrates that the privilege has been properly asserted.<sup>30</sup>

#### A. *Discovery Abuse*

The adoption of and subsequent amendments<sup>31</sup> to the federal discovery rules reflect clear policy choices. In theory, they seek to broaden the allowable scope of discovery, to eliminate excessive discovery demands utilizing objective limitations, to control response evasion with mandatory disclosure obligations, and to prevent frivolous law suits.<sup>32</sup> The discovery procedures have been described as "mak[ing] a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."<sup>33</sup> However, in recent years there has been a great deal of discovery abuse,

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25. HARE, *supra* note 3, at 31-32. See generally D.E. Ytreberg, Annotation, *Discovery & Inspection: Compelling Party to Disclose Information in Hands of Affiliated or Subsidiary Corporation, or Independent Contractor, Not Made Party to Suit*, 19 A.L.R.3d 1134 (1968 & Supp. 1992).

26. FED. R. CIV. P. 26(e)(1) (1993). See generally WRIGHT, *supra* note 14, § 2049.

27. FED. R. CIV. P. 37(c)(1) (1993).

28. See *Berkley v. Clark Equip. Co.*, 26 F.R.D. 153, 154 (E.D.N.Y. 1960).

29. FED. R. CIV. P. 26(b)(1).

30. FED. R. CIV. P. 26(b)(5).

31. See *supra* notes 10-11 and accompanying text.

32. HARE, *supra* note 3, at 65-68.

33. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958).

either by overuse and misuse of requests for discovery or by "stonewalling."<sup>34</sup> Under the FRCP, the party resisting disclosure, generally the defendant in the tobacco litigations, may actually gain even more control over the exchange of information, whereby plaintiffs, whose proof of a defendant's liability rests in the hands of the defendants themselves, file insufficiently supported claims as a result.<sup>35</sup> At least one commentator has noted, "lawsuits are often brought on scanty facts for the simple reason that the facts are in the hands of the adverse party," often wealthy and powerful defendants well equipped to stone-wall the process.<sup>36</sup> Furthermore, most such evasion goes unnoticed, compromising the search for the truth. Generally, those parties seeking discovery are more concerned with evasion and seek to broaden discovery, while those resisting discovery are more concerned with misuse of discovery requests and seek to narrow the scope of discovery.

Such manipulation of the discovery rules has been described as one of "the most powerful weapons in the arsenal of those who abuse the adversarial system for the sole benefit of their clients."<sup>37</sup> Various tactics utilized to stonewall discovery, such as boilerplate objections unsupported by factual basis or legal justification, have become commonplace. These tactics should theoretically result in Rule 37 sanctions.<sup>38</sup> While broad discovery requests are typically challenged by the courts as vague on one hand, the semantics of specifically worded discovery requests are given an unreasonably narrow interpretation by the courts to avoid disclosure on the other.<sup>39</sup>

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34. See generally Flegal, *supra* note 3. Stonewalling is a method of evasion in offering complete and timely responses to discovery requests. *Id.*

35. HARE, *supra* note 3, at 65-68.

36. See Arthur B. LaFrance, *Federal Rule 11 & Public Interest Litigation*, 22 VAL. U. L. REV. 331, 342 (1988).

37. *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir.), *cert. denied*, 114 S. Ct. 181 (1993) (quoting Tommy Prud'homme, *The Need For Responsibility Within the Adversarial System*, 26 GONZ. L. REV. 443, 460 (1990-1991)).

38. See *supra* part II.A., II.B. See, e.g., *Kramer v. Boeing*, 126 F.R.D. 690 (D. Minn. 1989). Examples of "boilerplate" objections include but are not limited to the following: irrelevancy, overbreadness, and burdensomeness. *Id.* at 698. See also *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292 (E.D. Pa. 1980).

39. See, e.g., *Emerick v. Fenick Indus.*, 539 F.2d 1379 (5th Cir. 1976); *Sellon v. Smith*, 112 F.R.D. 9, 11 (D. Del. 1986). See generally Walter Kiechel III, *The Strange Case of Kodak's Lawyers*, FORTUNE, May 8, 1978, at 188-90 (Eastman Ko-



Another tactic often used by defendants to restrict discovery is to attempt to artificially limit the scope of relevance of requested items,<sup>40</sup> including the issuance of misleading, incomplete or false responses in reply to discovery requests, leading plaintiffs to believe that further inquiry will be unproductive.<sup>41</sup> Other attempts to suppress meaningful discovery employ the practice of "dump truck discovery,"<sup>42</sup> a method of responding to discovery requests with volumes of uncatalogued and spurious information.<sup>43</sup> This tactic buries important evidence among a mass of useless information, and depletes the resources of the party seeking the discovery in a clerical exercise to "separate the wheat from the chaff."

Another common form of discovery abuse is the strategy of delay, which inevitably leads to a "war of attrition,"<sup>44</sup> protracted litigation designed to deplete an opponent's resources.<sup>45</sup> The de-

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dak's defense counsel drew distinction between "correspondence" and "reports" to justify its failure to produce relevant information).

40. See, e.g., *Malautea v. Suzuki Motor Co.*, No. CV 490-322 (S.D. Ga. Dec 30, 1991) (finding evasion of discovery based on a subjective, narrow view of relevance), *aff'd*, 987 F.2d 1536 (11th Cir.), *cert. denied*, 114 S. Ct. 181 (1993). One example of limiting the scope of relevance is limiting information to particular years or models. 987 F.2d at 1540.

41. See, e.g., *Babb v. Ford Motor Co.*, 535 N.E.2d 676, 682-83 (Ohio Ct. App. 1987) (defendant disclosed only a few harmless documents, while claiming it was complete disclosure); *In re "Agent Orange" Prod. Liability*, 506 F. Supp. 750, 751 (E.D. N.Y. 1980) (use of record retention system to conceal or destroy pertinent "damaging" information); *Foster v. Gillette Co.*, 161 Cal. Rptr. 134, 139 (Cal. Ct. App. 1979) (use of product tests after the discovery phase to exclude unfavorable test results).

42. See *supra* note 21 and accompanying text.

43. See, e.g., *American Rockwool, Inc. v. Owens-Corning Fiberglass Corp.*, 109 F.R.D. 263, 266 (E.D. N.C. 1985) (court held it was an abuse of the discovery rules to direct a plaintiff to a warehouse with millions of unsorted documents).

44. Plaintiff's Reply Brief app. A, *The Tobacco Companies' War of Attrition*, at 9, *Castano v. The American Tobacco Co., et al.*, (E.D. La. 1994) [hereinafter *Castano Appendix A*].

45. See, e.g., *Dean v. A.H. Robins Co.*, 101 F.R.D. 21 (D. Minn. 1984) (A.H. Robins Company defended the Dalkon Shield, an IUD contraceptive device, utilizing lengthy deposition and document discovery delays to wear down its opponents). See generally Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978). Delay responses to discovery requests include but are not limited to the following: requests for extensions to respond, denying the existence of documents, filing motions for reconsideration of orders compelling discovery, requesting protective orders prohibiting opponents from sharing information with others, and efforts to seek appellate review. See also HARE, *supra* note 3, at 94-102.

fendant's initial withholding of damaging information may also result in the plaintiff deciding that her best option is to seek an early settlement. Frequently, this settlement is substantially leaner than she would have considered if she had received all of the facts requested, since she is essentially unable to evaluate the merits of her case.<sup>46</sup> Delay inevitably means increased resource demands on the plaintiff, which works to the advantage of the wealthier parties, which are frequently, if not exclusively, the tobacco companies in the tobacco litigations.<sup>47</sup>

One other technique utilized to evade discovery is to falsely claim that the requested documents are not in the party's possession.<sup>48</sup> However, courts have unequivocally held that a party cannot avoid production of requested materials by subsequently turning them over to any third party.<sup>49</sup> In recent years there has been an increase in the frequency of reported destruction and spoliation of evidence.<sup>50</sup> This means avoiding disclosure is perhaps the most prejudicial to the opposing party and fatal to the goals of the judicial system by purging inculpatory evidence and preventing the truth from ever surfacing. A vast number of corporations, including the tobacco companies, have institutionalized document retention policies,<sup>51</sup> which are used to destroy incriminating evidence under the guise of the legitimate business purpose of saving warehouse space.<sup>52</sup> By destroying inter-

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46. HARE, *supra* note 3, at 96.

47. *Id.*

48. See *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984) (court observed that "[i]f defendant could so easily evade discovery, every United States company would have a foreign affiliate for storing sensitive documents.").

49. See, e.g., *Biehler v. White Metal Rolling & Stamping Corp.*, 333 N.E.2d 716, 721 (Ill. App. Ct. 1975) (documents transferred to defendant's insurance company is not permissible procedure).

50. See *In re General Motors Corp.*, No. 94-1011 (4th Cir. Mar. 23, 1994) (General Motor's lawyers' conduct included the shredding of engineering related documents). See also *Craig v. A. H. Robbins Co.*, 790 F.2d 1 (1st Cir. 1986). See generally JAMIE S. GORELICK ET AL., *DESTRUCTION OF EVIDENCE* (1989 & Supp. 1991).

51. For a discussion of various corporation document retention plans, see generally Baker, *Lecture: The Control of Documents*, 48 ANTITRUST L.J. 35 (1979); Fedders & Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME L. REV. 5 (1980); Borow & Baskin, *THE INTERNAL CORPORATE INVESTIGATIONS* 209, 212-13 (1980).

52. Dale A. Desterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185 (1983).

nal records, the corporations' exposure to litigation is inevitably reduced.<sup>53</sup> A corporation's document retention policy, though otherwise legitimately carried out, must be suspended once notice is received that the documents may be relevant to litigation.<sup>54</sup>

### B. *Combating Discovery Abuse*

One way in which plaintiffs have tried to level the playing field and better uncover defendants' relevant information is through the plaintiffs' litigation support group, which is a collaboration among plaintiffs with similar discovery goals.<sup>55</sup> This method of exposing evidence is most successful where the defendants are inconsistent in their suppression of materials between cases.<sup>56</sup>

Defendants, however, have developed several methods to counter this information sharing.<sup>57</sup> One method is to compel plaintiffs to identify in advance which of defendant's own records is required to respond to the discovery requests under the guise of tailoring their responses narrowly.<sup>58</sup> Allowing such requests both encourages the suppression of information not previously available to the plaintiff and discourages information sharing between plaintiffs.<sup>59</sup>

Another strategy to deprive plaintiffs of the ability to pool resources is to seek overly restrictive confidentiality orders,<sup>60</sup>

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53. *Id.* at 1185-86.

54. *Id.*

55. HARE, *supra* note 3, at 157. Such collaboration efforts include but are not limited to joint finding, use of experts, shared research, and pooling common documents. *Id.* at 165-66.

56. *Id.* at 157.

57. *Id.*

58. *Id.* at 109.

59. HARE, *supra* note 3, at 109-16.

60. *Id.* at 157-80. In *Green v. Ford Motor Co.*, Ford Motor Company moved for a protective order reasoning that:

The information, if traded with other law firms engaged in similar litigation with Ford, would allow these attorneys to pool their information pertaining to this corporate giant, more adequately prepare their case for trial, simplify the discovery process, confirm Ford's candor in responding to discovery requests, and, accordingly, potentially result in verdicts against Ford Motor Company.

*Id.* at 158 (quoting Affidavit of Rudolph J. Persico, attached in support of the defendant's Motion for Protective Order, *Green v. Ford Motor Co.*, No. 40-3572 (San

which prevent a plaintiff from disclosing discovery materials to other litigants, or to the public.<sup>61</sup> The authority to seek such protective orders is found in Rule 26(c) which protects "trade secrets or other confidential development or commercial information" from disclosure.<sup>62</sup> As with trade secrets, the defendant must meet a heavy burden of proof, however, including a showing that harmful effects would result from any competitive use of the allegedly privileged materials,<sup>63</sup> in order to justify restrictions in the use of any document.<sup>64</sup> In weighing these competing factors, the courts have acknowledged the value of plaintiffs' collaborative efforts to level the playing field, to deter stonewalling, as well as to promote efficient, accurate and complete discovery.<sup>65</sup> As a result, courts have generally denied requests for Rule 26(c) protective orders, construing the terms "trade secrets" and "confidential" narrowly in a liberal construction of the discovery rules.<sup>66</sup>

A decision to deny such an order is more common in products liability cases, where the purpose of the protective order is to protect industry trade secrets, than in commercial litigation, where the purpose of the order is commonly designed to hamper the plaintiffs' preparation for trial.<sup>67</sup> Matters of general knowledge, those affecting the public health, evidence of poor management and general allegations injurious to the defendant corporation's reputation do not rise to the level of trade secret protection.<sup>68</sup>

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Diego County, Cal. Super. Ct. Apr. 16, 1971)). See generally Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428 (1991).

61. HARE, *supra* note 3, at 157.

62. FED. R. CIV. P. 26(c)(7) (1993).

63. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 (1984).

64. See, e.g., General Dynamics Corp. v. Selb Mfg. Corp., 481 F.2d 1204, 1212-13 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974).

65. See, e.g., Baker v. Liggett Group, Inc., 132 F.R.D. 123, 125-29 (D. Mass. 1990); Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982).

66. See Parsons v. General Motors Corp., 85 F.R.D. 724, 726 (N.D. Ga. 1980); HARE, *supra* note 3, at 159.

67. HARE, *supra* note 3, at 158-59. There exists an ever increasing number of requests for protective orders in products liability cases. *Id.*

68. *Id.* at 172-76 (citing Garcia v. Peebles, 734 S.W.2d 343, 348 n.4 (Tex. 1987)). See also Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986); Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n, 710 F.2d 1165, 1180 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

While corporate defendants attempt to dissuade their opponents from any collaborative efforts, they frequently coordinate their defenses, jointly developing litigation strategies and sharing information among themselves.<sup>69</sup> In complex tort cases, as in most products liability actions, the defendants' advantage in expertise, knowledge and resources is further magnified by their access to collaborative mechanisms.<sup>70</sup>

Since detection of such discovery abuse is difficult, success in detection lies with the profession and the courts. There is a growing trend towards greater and harsher penalties in response to evidence being withheld, lost, destroyed or altered.<sup>71</sup> Courts have the authority to limit a party's discovery in response to their abuses where the interests of justice require; such sanctions function to punish, compel discovery or compensate the court or the other litigants.<sup>72</sup>

In all, "discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation."<sup>73</sup> Corporate defendants must be made to know in advance of litigation that the costs of abuse will be greater than any benefits of stonewalling.<sup>74</sup>

### III. The Privilege Doctrines

Some materials normally discoverable under the FRCP may be protected by two powerful doctrines: the attorney-client privilege and the work product doctrine. These doctrines operate to protect communications between a client and her attorney and to protect the thoughts and strategies of a lawyer in relation to her representation of a client. These doctrines act to

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69. HARE, *supra* note 3, at 163.

70. *Id.* at 164.

71. See generally Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need For Vigorous Judicial Action*, 13 CARDOZO L. REV. 793 (1991).

72. FED. R. CIV. P. 16, 26(b)(2) and (c), 37. See generally Arthur R. Miller, *supra* note 60, at 450-63; Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958).

73. HARE, *supra* note 3, at 211 (quoting J. Dooley in *Buehler v. Whelan*, 374 N.E.2d 460, 467 (Ill. 1978). These sanctions when imposed must be consistent and final. *Id.* at 209-11. The party challenging the sanction bears a heavy burden of demonstrating that the trial court abused its discretion. *Id.* at 210.

74. See Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

shield qualifying materials from discovery by an adverse party. However, they are not without limitations.<sup>75</sup>

### A. *The Attorney-Client Privilege*

"The attorney-client privilege is the oldest of privileges for confidential communication known to the common law."<sup>76</sup> Courts have continually attempted to establish boundaries within which the privilege should apply, by looking at the purpose and policy of the privilege, and by seeking a balance between confidentiality and the right to information.<sup>77</sup>

#### 1. *The Development of the Privilege*

The origin of the attorney-client privilege can be traced back to second century Rome, where slaves were prohibited from disclosing any communications made by any member of their master's family.<sup>78</sup> This policy was based on the premise that a slave was a member of the master's family, and promoting confidence within the family was of utmost importance.<sup>79</sup> In England, during the reign of Elizabeth I, the privilege was narrowed to protect only communications within the attorney-client relationship.<sup>80</sup> During this period, the lawyer was the holder of the privilege; he stood by his "code of honor" and refused to turn "informer" against his client.<sup>81</sup> In the mid-1700s, this privilege was transferred from the attorney to the client,

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75. See *infra* parts III.D-E.

76. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Haines v. Liggett*, 975 F.2d 81, 83 (3d Cir. 1992). For a general discussion of the historical context of the attorney-client privilege, see generally Geoffrey Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978).

77. See Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 424-27 (1970).

78. See Marshall Williams, *The Scope of the Corporate Attorney-Client Privilege in View of Reason and Experience*, 25 HOW. L. J. 425, 426 (1982) [hereinafter Williams]. There existed slave-servants in almost every aspect of Roman life, including slave-attorneys. *Id.*

79. *Id.*

80. *Id.*

81. Alvin K. Hellerstein, *A Comprehensive Survey of the Attorney-Client Privilege and the Work Product Doctrine*, at 579 (PLI Litig. & Admin. Practice Course Handbook Series No. 498, 1994) [hereinafter Hellerstein]. See also J. WIGMORE, EVIDENCE § 2290 (McNaughton ed. 1961). At such time the legal profession was based on this "code of honor," where the attorney had a duty to protect the confidences of the client. *Id.*

"when the desire for truth overcame the wish to protect the honor of witnesses."<sup>82</sup> As business dealings grew more complex and the assistance of an attorney in a person's business affairs became necessary, it became imperative to the business economy that clients have complete assurance that their affairs would remain confidential and that their attorneys would not be able to disclose such matters at their option.<sup>83</sup> However, where the purpose of the client's communication with the attorney was to seek assistance in committing an illegal act, an attorney-client relationship was held not to exist because such service was prohibited.<sup>84</sup> By the close of the eighteenth century, the traditional emphasis on the oath and honor of a lawyer was abandoned, replaced by a promotion of confidentiality in order to facilitate the free exchange of information between the client and the counselor.<sup>85</sup>

American society was greatly influenced by the English scope and application of the privilege, and although its rationale has changed, the privilege remains in force.<sup>86</sup> The concept of encouraging a client to fully and accurately disclose information to her attorney remains a necessary foundation to our adversarial system.<sup>87</sup>

## 2. *The Scope of the Privilege*

In the early American cases, the scope of the privilege was extended to provide almost complete protection to all communications made within the course of attorney employment.<sup>88</sup> Many began to feel that the broad scope of the privilege was at odds with "the fundamental principle that the public . . . has a

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82. *Id.* (quoting *In re Colt*, 201 F. Supp. 13, 15 (S.D.N.Y. 1961)).

83. See Williams, *supra* note 78, at 429 (citing *Annesley v. Anglesea*, 17 How. St. Tr. 1139 (Ex. 1743)).

84. Williams, *supra* note 78, at 427-28.

85. See Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 291-92 (1963).

86. See, e.g., *Dixon v. Parmalee*, 2 Vt. 185, 189 (1829) (Judge Paddock recognized the English limitation that the privilege belongs to the client, not the attorney).

87. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *United States v. Grand Jury Investigation*, 401 F. Supp. 361, 369-70 (W.D. Pa. 1975).

88. See *Hunt v. Blackburn*, 128 U.S. 464, 470 (1880); *Root v. Wright*, 84 N.Y. 72 (1881).

right to every man's evidence."<sup>89</sup> While the privilege promotes the public interest of allowing a client to freely consult with an attorney without fear of disclosure, its broad application is quite inconsistent with the general duty to disclose.<sup>90</sup>

At the turn of the century, Wigmore set out the elements of the privilege in an attempt to construe the privilege more narrowly, stating that the attorney-client privilege applies only to confidential communication where:

(1) legal advice of any kind is sought (2) from a professional legal adviser [sic] in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser [sic] (8) except the protection be waived.<sup>91</sup>

A communication is immune from discovery once it is deemed to be privileged;<sup>92</sup> the privilege protects the process of communicating confidential information and not the factual content of the communication itself.<sup>93</sup> Materials that may be within the scope of the privilege include oral statements, written documents and tangible objects.<sup>94</sup>

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presense of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding and not (d) for the purpose of committing

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89. Linde Thomson Langworthy Kohn & Van Dyke v. RTC, 5 F.3d 1508, 1514 (D. C. Cir. 1993) (quoting University of Pa. v. EEOC 493 U.S. 182, 189 (1990) (citation omitted)).

90. Robert J. Franco et al., *The Inadvertent Waiver of Privilege*, 26 TORT & INS. L. J. 637, 638 (1991).

91. WIGMORE, *supra* note 81, at 554. See also U.S. v. United Shoe Machinery Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

92. PREVENTIVE LAW PRACTICE: RECOMMENDATIONS AND GUIDELINES, PRESERVING PRIVILEGE AND CONFIDENTIALITY: THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE, A.B.A. 1 (1994) [hereinafter PREVENTIVE LAW].

93. HARE, *supra* note 3, at 14.

94. Haines, 975 F.2d at 90.



a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.<sup>95</sup>

No actual representation need be undertaken for the privilege to operate to protect communications between qualifying parties.

### B. *The Work Product Doctrine*

While the attorney-client privilege is limited to the confidential communications between a client and her attorney, the work product doctrine affords special protection to a lawyer's research, analysis and mental impressions assembled in anticipation of trial, as in her "work product," and encompasses any document prepared in anticipation of litigation.<sup>96</sup> Originally established in *Hickman v. Taylor*,<sup>97</sup> the doctrine arose out of a need to furnish the attorney with a "zone of privacy" within which to think about, analyze and prepare a case.<sup>98</sup> Rule 26 (b)(3)<sup>99</sup> codifies the work product doctrine, and, in effect, a zone of privacy is created "free from unnecessary intrusion by opposing parties and their counsel."<sup>100</sup>

For the doctrine to apply, the material at issue must be (i) a document or tangible item otherwise discoverable,<sup>101</sup> (ii) which was prepared in anticipation of litigation or for trial,<sup>102</sup> (iii) by

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95. WRIGHT, *supra* note 14, § 2017 (quoting *United States v. United States Shoe Machinery Co.*, 89 F. Supp. 357, 358 (Mass. Dist. Ct. 1950). See *infra*, part III.D.

96. Harvey L. Pitt et al., *Corporate Confidentiality and the Development of the Corporate Self-Evaluative Privilege* (PLI Litig. & Admin. Practice Course Handbook Series No. 506, 1985).

97. 329 U.S. 495 (1947).

98. *Id.* at 510; Alvin K. Hellerstein et al., *A Comprehensive Survey of the Attorney-Client Privilege and Work Product Doctrine*, (837 A.L.I.-A.B.A. 59 (1993) (quoting *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 142-43 (D. Del. 1982)).

99. FED. R. CIV. P. 26(b)(5) (1993).

100. *Hickman*, 329 U.S. at 510.

101. The protection has generally been held to apply only to written documents and tangible things, not oral communications. PREVENTIVE LAW, *supra* note 92, at 1.

102. Protection applies to materials assembled and brought into being in anticipation of litigation, not "assembled in the ordinary course of business or pursuant to public request unrelated to litigation." ADV. COMM. NOTES TO FED. R. CIV. P. 26, at 712, (1970) [hereinafter ADV. COMM. NOTES]. The litigation need not be imminent, provided the materials are intended to aid possible future litigation. *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981), *cert. denied*, 454 U.S. 862 (1981). However, in preparing for litigation the work product doctrine only

or for a party or the party's representative.<sup>103</sup> Where an attorney has selected relevant, otherwise non-privileged materials in anticipation of trial, such documents by their mere selection may reveal the attorney's strategy and therefore are protected from discovery.<sup>104</sup>

Attorney work product has been divided into two categories, ordinary work product and opinion work product, consisting of mental impressions, conclusions, theories or opinions of the attorney.<sup>105</sup> An attorney's selection and assemblage of information is protected as opinion work product.<sup>106</sup>

Ordinary work product is discoverable where the party seeking discovery proves a "substantial need" for the materials in their own trial preparation, as well as a showing that the production of the requested materials by any other means would create "undue hardship."<sup>107</sup> On the other hand, opinion work product is rarely discoverable, even by a showing of "substantial need" or "undue hardship."<sup>108</sup>

Beyond considering whether a statement is protected as opinion work product, the determining factor concerning the discoverability of work product material is whether it was prepared in the ordinary course of business, in which case it is discoverable as ordinary business records, or in anticipation of litigation, in which case it is protected by the work product doc-

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protects those documents involving legal skill, not those prepared by a layman. *Bloss v. Ford Motor Co.*, 126 A.D.2d 804, 805, 510 N.Y.S.2d 304, 305 (3d Dep't 1987).

103. The protection includes, but is not limited to, an attorney and is therefore much broader than the attorney-client privilege. *PREVENTIVE LAW*, *supra* note 92, at 1. Courts have held the work product doctrine to apply to paralegals also. *See, e.g., Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037, 1044 (W.D. Mo. 1984); *In re Grand Subpoena Duces Tecum* 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975). *See generally* WRIGHT, *supra* note 14, § 2024.

104. *See Shelton v. American Motors Corp.*, 805 F.2d 1323, 1328 (8th Cir. 1986); *Sporck v. Peil*, 759 F.2d 312, 315 (3d Cir. 1985), *cert. denied*, 474 U.S. 903 (1985).

105. FED. R. CIV. P. 26(b)(3).

106. *See Shelton v. American Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977).

107. FED. R. CIV. P. 26(b)(3). *See* WRIGHT, *supra* note 14, § 2025, at 374.

108. WRIGHT, *supra* note 14, § 2026, at 398-400. *See Shelton*, 805 F.2d at 1323; *LaRocca v. State Farm Mut. Auto. Ins. Co.*, 47 F.R.D. 278, 282 (W.D. Pa. 1969). *See infra* part III.D.

trine.<sup>109</sup> The production records maintained by corporations are normally kept in the ordinary course of business, and are therefore generally discoverable as business records.<sup>110</sup> Such business records do not acquire work product immunity simply because an attorney has assisted in their organization or preparation, or because they have been collected in anticipation of litigation.<sup>111</sup> Even when a court finds that the materials were prepared solely in anticipation of litigation, it may find that the plaintiff has a "substantial need" for the documents, or would endure such "undue hardship" in trying to acquire them from some other source that the court will order disclosure.<sup>112</sup>

### C. *The Privilege Doctrines in the Corporate Context*

The attorney-client privilege has existed for individuals for centuries, but it was not applied to corporations until the early twentieth century<sup>113</sup> because of the complex federal laws to which corporations were subject.<sup>114</sup> It is still applied to corporations only on a case-by-case basis, and is prohibited where the corporation "funneled its papers and documents into the hands of its lawyers for custodial purposes and thereby [to] avoid dis-

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109. ADV. COMM. NOTES, *supra* note 102, at 712. See, e.g., *Blough v. Food Lion, Inc.*, 142 F.R.D. 622, 624 (E.D. Va. 1992) (defendant's accident report was discoverable as it was prepared in the ordinary course of business).

110. See, e.g., *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 301-03 (E.D. Pa. 1980).

111. *Fisher v. United States*, 425 U.S. 391 (1976) (Plaintiff transferred financial and accountants' records to his lawyer to obtain legal advice and the Internal Revenue Service attempted to summon the material from plaintiff's lawyer. The court held that "pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice."). *Id.* at 403-04. See also *Hoffman v. United Telecommunications Inc.*, 117 F.R.D. 436, 438-39 (D. Kan. 1987).

112. See, e.g., *Lee v. Honda Motor Co.*, CA No. 9103-01752 (Multnomah County, Or. Cir. Ct. Feb. 4, 1992) (court ordered defendant to produce a complete index of materials in their central warehouse, even where the index was prepared for trial due to the pressing need for an accurate index and the inability to obtain the information by other means).

113. *United States v. Louisville & N.R.R.*, 236 U.S. 318, 336 (1915) (applying attorney-client privilege to a corporation for the first time).

114. See Williams, *supra* note 78, at 425 (citing Brodsky, *The Zone of Darkness: Special Counsel Investigations and the Attorney-Client Privilege*, 8 SEC. REG. L. J. 123 (1980)). For discussion on the application of the attorney-client privilege to a corporation, see generally *Attorney-Client Privilege in Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360 (1970).

closure. . . . [or] [w]hen the client seeks business or personal advice, as opposed to legal assistance.”<sup>115</sup>

The United States District Court for the Northern District of Illinois in *Radiant Burners, Inc. v. American Gas Ass’n*<sup>116</sup> described the privilege as “purely personal in nature,” whereby the element of confidentiality and the “zone of silence” could not be maintained if the privilege extended to every document and person in a major corporation.<sup>117</sup> On appeal, this decision was reversed, with the court holding that the privilege does apply to corporations.<sup>118</sup> The majority of courts took for granted that a corporation needs legal advice in order to conduct its affairs, thereby limiting the privilege only to those corporate employees in a “control group,” who were actively involved in the decision making process.<sup>119</sup> Limiting the privilege to only those employees in positions of control prevents witness employees or third parties from supplying information to the corporate attorney.<sup>120</sup> However, this “control group” test failed to acknowledge the vast amounts of information generated at the lower levels of the corporation.<sup>121</sup> To deny protection of such information would allow for “unnecessary fishing expeditions and even unwarranted litigation in some cases.”<sup>122</sup>

In response to this contradictory outcome, the court in *Harper & Row Publishers, Inc. v. Decker*<sup>123</sup> expanded the scope of the privilege to cover almost any corporate employee whose communication was made at the direction of his “superiors” and is the subject of the legal advice sought.<sup>124</sup> This test not only encourages complete and accurate communication between at-

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115. *Radiant Burners, Inc. v. American Gas Ass’n*, 320 F.2d 314, 324 (7th Cir. 1963). See *infra* part III.C.2.

116. 207 F. Supp. 771 (N.D. Ill. 1962).

117. *Id.* at 773-74.

118. *Radiant Burners Inc.*, 320 F.2d at 324.

119. See, e.g., *Nalta v. Hogan*, 392 F.2d 686, 693 (10th Cir. 1968); *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485-86 (E.D. Pa. 1962).

120. *Philadelphia*, 210 F. Supp. at 485.

121. *Williams*, *supra* note 78, at 440-41.

122. *Id.* at 440.

123. 423 F.2d 487 (7th Cir. 1970), *aff’d per curiam*, 400 U.S. 348 (1971).

124. *Id.* at 490-92. The test is referred to as the “subject matter test,” and is recognized as a corollary to the “control group test.” *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1165 (citing *Harper and Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970)).

torney and client, it also broadens the "zone of silence," providing significantly more protection to the corporate client.

With the growing complexity of the corporate structure, it became increasingly difficult to define the "control group" or the "superiors," and it became impractical for a corporation to limit its communication with counsel to those defined employees.<sup>125</sup> The Supreme Court in *Upjohn v. United States*<sup>126</sup> rejected this "control group" standard and other tests<sup>127</sup> then in force as narrow and unpredictable in extending the privilege to communications with an attorney by lower level employees within the scope of the employee's corporate duties.<sup>128</sup> After looking at the purpose and policy of the privilege and embracing the common law definition of the privilege as established by Wigmore,<sup>129</sup> the court held that the control group test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."<sup>130</sup> In response to the lower court's concern about the broad "zone of silence," the United States Supreme Court stated that the privilege applied only to the communication itself, not to the facts within a communication, which remained subject to discovery.<sup>131</sup> In-house investigations are common within corporations in an effort to comply with these laws; depending on the scope of the privilege as applied, these investigations would either be discouraged, subjecting the corporations to mandatory disclosure or encouraged to a point which would "render it extremely difficult to obtain evidence of a corporation engaging in questionable, if not illegal, conduct."<sup>132</sup>

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125. Williams, *supra* note 78, at 440-41.

126. 449 U.S. 383 (1981). For a thorough discussion of *Upjohn*, see John Sexton, *A Post-Upjohn Consideration of Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443 (1982).

127. For discussions of other tests leading up to *Upjohn*, see generally Williams, *supra* note 78, at 441-50.

128. *Upjohn*, 449 U.S. at 392-93.

129. See *supra* note 81 and accompanying text.

130. *Upjohn*, 449 U.S. at 392. In support of this conclusion, see also *Trammel v. United States*, 445 U.S. 40, 47 (1979) (court stated that Congress manifests an affirmative intention not to freeze the law of privilege, encouraging the application of "reason and experience" on a case-by-case basis).

131. *Upjohn*, 449 U.S. at 392-93.

132. Williams, *supra* note 78, at 395.

### 1. *The Scope of the Corporate Privilege*

Although Justice Rehnquist's majority opinion in *Upjohn* clearly rejected earlier tests to determine the scope of the attorney-client privilege, Chief Justice Burger, in his concurrence, claimed that Justice Rehnquist failed to establish a rule to be employed in future similar cases.<sup>133</sup> Commentators found instead that *Upjohn* adopted a broad standard protecting the communications of all corporate employees,<sup>134</sup> provided that the attorneys communicate directly with only the employees possessing the necessary information, such employees are sufficiently aware of the purpose of that communication, and the protection is limited to the communication itself, not facts.<sup>135</sup> A year later, in *United States v. King*,<sup>136</sup> the court found that *Upjohn* provided authority to extend the attorney-client privilege to former employees of the corporation, where those employees may possess information needed by an attorney for her adequate representation of the corporate client.<sup>137</sup>

The privilege established in *Upjohn* extends to either in-house or retained counsel,<sup>138</sup> and most courts have interpreted the privilege to extend to communications with a sister corporation.<sup>139</sup> Where the communications between separate corporations are "part of an ongoing and joint effort to set up a common defense strategy," courts may find a joint defense privilege.<sup>140</sup>

Courts have held research studies and tests discoverable where the subject matter of the study was relevant to the controversy.<sup>141</sup> Furthermore, courts have held that a defendant

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133. *Upjohn*, 449 U.S. at 386 (Burger, C.J., concurring in part and concurring in the judgment).

134. See also PREVENTIVE LAW, *supra* note 92, at 4; Sexton, *supra* note 126, at 472-73.

135. Williams, *supra* note 78, at 462-64.

136. 536 F. Supp. 253 (C.D. Cal. 1982).

137. *Id.* at 258-59; see also *Admiral Ins. Co. v. United States District Court*, 881 F.2d 1486, 1493 (9th Cir. 1989).

138. See, e.g., *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 540 N.E.2d 703 (1989).

139. See, e.g., *Roberts v. Carrier Corp.*, 107 F.R.D. 678, 688 (N.D. Ind. 1985); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950). See generally PREVENTIVE LAW, *supra* note 92.

140. *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir. 1985), *cert. denied*, 474 U.S. 946 (1985).

141. See, e.g., *Snowden v. Connaught Lab, Inc.*, 137 F.R.D. 336, 345-46 (D. Kan. 1991) (where research before and after sale of a product was discoverable to

manufacturer's research and development data is discoverable.<sup>142</sup>

## 2. *Legal Advice v. Business Advice*

Where communications are made from attorney to client, and not vice versa, there is greater controversy. The majority of courts have found that legal advice is privileged,<sup>143</sup> while a minority of courts have taken a much narrower view, finding that only those legal communications which reveal a client's actual disclosure are privileged.<sup>144</sup> There is no consensus among courts where an attorney receives information from a client requesting both legal and business advice.<sup>145</sup> At least one court has held that this determination hinges on the critical factor of whether the privileged information can be distilled from the nonprivileged facts.<sup>146</sup>

Recognizing the inconsistency of courts' efforts to frame a definite test for distinguishing legal from nonlegal advice, Wigmore proposed that:

"[w]here the general purpose of the communication concerns legal rights and obligations, a particular incidental transaction would receive protection, though in itself it were merely commercial in nature as where the financial condition of a shareholder is discussed in the course of a proceeding to enforce a claim against a corporation."<sup>147</sup>

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determine if the manufacturer could have made a safer product); *Accord* Fibron Products, Inc. v. Hooker Chem. Corp., 26 Misc. 2d 799, 206 N.Y.S.2d 659 (Sup. Ct. 1960); *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477, 480 (W.D. Mo. 1950).

142. *See, e.g.*, *Hess v. Pittsburgh Shell Foundry & Mach. Co.*, 49 F.R.D. 271 (W.D. Pa. 1970) (inter-company correspondence relating to the feasibility of alternative designs of grinding wheels was discoverable).

143. *United States v. Amerada Hess Corp.*, 619 F.2d 980, 986 (3rd Cir. 1980).

144. *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977).

145. *See United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950) (privilege not lost where mixed questions of law and business). *But see United States v. Loftin*, 518 F. Supp. 839, 846 (S.D.N.Y. 1981) (privilege is lost even to legal advice where mixed legal and business considerations in the same communication).

146. *See Redvanley v. Wynex Corp.*, No. 92 Civ. 2325, 1993 U.S. Dist. LEXIS 14550 \*1 (S.D.N.Y. 1993).

147. *United States v. Woodruff*, 383 F. Supp. 696, 697 (E.D. Pa. 1974) (quoting WIGMORE, *supra* note 81, § 2296).

#### D. Waiver of the Privilege

Preserving confidentiality on the part of the client is critical to the maintenance of both the attorney-client privilege and work product doctrine. Indeed, one court held that "if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels - - if not crown jewels."<sup>148</sup> This requirement of confidentiality may be compromised either through the client's disclosure of the communications themselves, or through the disclosure of documents or counsel statements which reveal the communications.<sup>149</sup> However, confidentiality is not compromised by an attorney who employs investigators or experts to assist him in processing and evaluating information and the communication of only enough privileged information to those employees to allow them to complete their assigned duties.<sup>150</sup> Note, however, only the communication between the attorney and client are protected by attorney-client privilege, unlike these communications conducted with non-lawyers.<sup>151</sup> As the attorney-client privilege belongs to the client, not the attorney, the client alone may waive all or part of a privileged communication.<sup>152</sup>

A disclosure may be either intentional or unintentional. While courts have traditionally held that an unintentional disclosure of confidential information does result in a waiver of the privilege,<sup>153</sup> the modern trend is against finding that an inadvertent waiver of the privilege has occurred.<sup>154</sup> In determining

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148. *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989). See also *Leathers v. United States*, 250 F.2d 159, 165-66 (9th Cir. 1957); *Himmelfarb v. United States*, 175 F.2d 924, 938-39 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949).

149. *In re Sealed Case*, at 979.

150. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

151. *United States v. Bein*, 728 F.2d 107, 113 (2d Cir. 1984) (holding that conversations between his accountant, outside the presence of any attorneys, were not protected by the attorney-client privilege).

152. *In re Subpoena Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984) (holding that client disclosures constituted a "limited waiver" of the privilege). Compare *United States v. Cote*, 456 F.2d 142, 144-45 (8th Cir. 1972) (disclosure of any significant portion of a confidential communication waives the entire privilege).

153. See, e.g., *W.R. Grace & Co. v. Pullman, Inc.*, 446 F. Supp. 771 (W.D. Okla. 1976); *Underwater Storage Inc. v. United States Rubber Company Co.*, 314 F. Supp. 546 (D.D.C. 1970).

154. *Kansas City Power & Light Co. v. Pittsburgh & Midway Coal Min. Co.*, 133 F.R.D. 171 (D. Kan. 1989) (where precautions were taken but three privileged



if a waiver has occurred, the court will examine both the intent and the totality of the disclosure.<sup>155</sup> For example, the communication of information to an attorney, where there existed an understanding that the information would be conveyed to others, waives the privilege,<sup>156</sup> and where a client puts a confidential communication at issue in litigation, even inadvertently, a waiver will be implied.<sup>157</sup> The privilege is also waived where a disclosure is selectively volunteered to prove or disprove a related point,<sup>158</sup> or where there is a failure to timely object to the disclosure of privileged information.<sup>159</sup> Once a party abandons confidentiality by divulging privileged material, the rationale of the privilege is dissipated and the privilege is waived.<sup>160</sup>

The work product doctrine provides qualified protection against the disclosure of materials prepared by a client or her attorney in anticipation of litigation. The work product privilege is not lost simply because attorneys may collaborate in their preparation of materials in preparation for litigation,<sup>161</sup> nor is it automatically lost where the information was prepared

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documents out of more than 200,000 documents were disclosed, and still did not constitute a waiver); *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 398 (4th Dep't 1987) (where negligence of counsel sufficed to waive the privilege); *Lois Sports Wear U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985) (holding that the inadvertent disclosure of 22 privileged documents along with some 16,000 pages of non-privileged information did not waive the privilege given there lacked the intent to do so).

155. *Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982).

156. *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984) (holding that intent to keep the information private was critical to the attorney-client privilege). *Cf. Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323 (N.D. Cal. 1985) (stating that waiver need not be intentional).

157. *State v. Miller*, 600 F.2d 498 (5th Cir.), *cert. denied*, 444 U.S. 955 (1979) (client in a securities fraud case subjected himself to cross examination of otherwise privileged communication by claiming a good-faith reliance on his lawyer's advice).

158. *In re Von Bulow*, 828 F.2d 94 (2d Cir. 1987) (where court issued a writ of mandamus and directed the lower court to vacate its discovery order, rejecting a claim of attorney-client privilege as to extrajudicial disclosures in a book by the party's own attorney).

159. *See Baxter Travenol Labs, Inc. v. Abbott Labs*, 117 F.R.D. 119 (N.D. Ill. 1987).

160. *Weil v. Investment Indicators, Research & Management, Inc.*, 647 F.2d 18, 23-25 (9th Cir. 1981).

161. *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979).

for prior litigation.<sup>162</sup> The work product privilege ends only when the materials are disclosed to a third party and it becomes likely "that an adversary will obtain the privileged information."<sup>163</sup> Once an adversary actually sees the document, regardless of their method of acquisition, the issue of confidentiality becomes moot and most courts have found that the privilege no longer exists as to those disclosed documents.<sup>164</sup>

In the corporate context, in order to maintain the work product privilege, the corporation claiming the privilege must demonstrate that the allegedly privileged information was distributed only to a narrow group of employees strictly on a "need to know basis"; only employees having direct involvement in the matters at hand or being in need of the proffered legal advice may have access to the privilege information.<sup>165</sup> Some courts have held that the fact that the materials are located in the corporation's files does not necessarily render them confidential.<sup>166</sup>

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162. *In re Murphy*, 560 F.2d 326 (8th Cir. 1977). See generally D. Christopher Wells, *The Attorney Work Product Doctrine & Carry-Over Immunity: An Assessment of Their Justifications*, 47 U. PITT. L. REV. 675 (1986).

163. Hellerstein, *supra* note 81, at 16 (quoting *Shulton, Inc. v. Optel Corp.*, No. 85-2925, slip op. at 10 (D.N.J. Nov. 4, 1987)); *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

164. *Chubb Integrated Sys., Ltd. v. National Bank of Washington*, 103 F.R.D. 52, 63 (D.D.C. 1984). See also *Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982) (waiving the work product privilege where in-house counsel memoranda given to SEC under a voluntary disclosure program bound corporation to provide SEC access to underlying documents).

165. See, e.g., *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980); *In re Grand Jury Proceedings (Berkley & Co.)*, 466 F. Supp. 863, 870 (D. Minn. 1979). But see *In re Dayco Corp. Derivative Sec. Litig.*, 15 Sec. Reg. & L. Rep. (BNA) 2100 (S.D. Ohio Oct. 21, 1983) (holding that the distribution of a press release of the findings of an investigation without the facts which lead to this conclusion did not waive the privilege; also noting that the substantial need test was not satisfied to overcome the privilege).

166. See *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954) (holding that once the corporation voluntarily made its files available for examination, any privilege attached to these particular documents is waived). But see *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 142 (D. Del. 1982) (holding that the fact that some unauthorized corporate personnel may purposely or inadvertently read a privileged document, kept in a file, does not remove confidentiality); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980) (circulating training materials - filed and indexed for future use - throughout the office, renders them unconfidential).

### E. *Exceptions to the Privilege Doctrines*

Although the privilege afforded to attorney-client communications and work product has long been recognized by the courts as central to the functioning of our adversarial system, these privileges are far from absolute.<sup>167</sup> Courts have required that the privilege be "strictly construed" since it "impedes the full and free discovery of the truth and is in derogation of the public's right to every man's evidence."<sup>168</sup> Courts have also suggested that such doctrines must sometimes yield to strong public policy.<sup>169</sup>

#### 1. *Abuse of Attorney-Client Relationship Exception*

The protections afforded by the aforementioned privilege doctrines may also be negated by "substantial abuse[ ] of the attorney-client relationship."<sup>170</sup> Generally, the privilege applies only to legal advice and attorney-client communications,<sup>171</sup> and courts have refused to extend the privilege to protect a client's identity or whereabouts,<sup>172</sup> the amount and source of fees,<sup>173</sup> or to legal advice which does not reveal a client's confidences.<sup>174</sup>

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167. *Clark v. United States*, 289 U.S. 1, 15 (1933).

168. *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984) (citing *Weil v. Investment Indicators, Research & Management*, 647 F.2d 18, 24 (9th Cir. 1981); *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973), *cert. denied*, 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed. 2d 86).

169. *See, e.g.*, *Matter of Nalkson*, 555 A.2d. 1101, 1106 (1989).

170. *Int'l Tel. & Tel. Corp. v. United Tel. Co.*, 60 F.R.D. 177, 180 (M.D. Fla. 1973).

171. *United States v. Grand Jury Investigation*, 401 F. Supp. 361 (W.D. Pa. 1975).

172. *See In re Matter of D'Alesio*, N.Y. L.J., Oct. 2, 1992 at 28 (N.Y. Sup. Ct., Westchester County) (court held that a client's identity is not privileged since it is not relevant to the legal advice provided for which the attorney-client privilege exists). *But also Dean v. Dean*, 607 So. 2d 494 (Fla. Dist. Ct. App. 1992) (court found the client's contacting the lawyer concerning a robbery indicated a strong desire to keep his identity confidential); *In re Grand Jury Subpoenas*, 408 F. Supp. 1169 (S.D.N.Y. 1976) (holding that location of client was privileged, having been communicated in the course of receiving advice from attorney).

173. *See, e.g.*, *In re Michaelson*, 511 F.2d 882, 888 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975); *In re Grand Jury Proceedings (Judge Wine)*, 841 F.2d 230 (8th Cir. 1988).

174. *See, e.g.*, *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 520-23 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976) (stating that the privilege does not extend to statements of fact, independently acquired by attorneys); *RCA v. Rauland Corp.*, 18 F.R.D. 440, 443-44 (N.D. Ill. 1955) (holding that client waived privilege by disclosing document to third party). *But see Rossi v. Blue Cross & Blue*

Also, where the privilege is in direct conflict with the rules of disclosure of evidence, the privilege gives way. Counsel cannot unlawfully obstruct another party's access to relevant evidence or unlawfully alter, destroy or conceal information having potential evidentiary values,<sup>175</sup> nor may she offer false evidence, regardless of the client's wishes.<sup>176</sup>

## 2. *Self Defense Exception*

The Model Code provides that an attorney may reveal a client's confidential information if "necessary . . . to defend himself . . . against an accusation of wrongful conduct."<sup>177</sup> Although a lawyer may never knowingly assist in a client's fraud, he may reveal confidential information which he believes reasonably necessary "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."<sup>178</sup> This self-defense exception is strictly limited to cases of reasonable necessity, otherwise the willingness of clients to communicate openly with their counsel would be seriously undermined.<sup>179</sup>

## 3. *Crime-Fraud Exception*

As early as 1884, courts held that the attorney-client privilege does not extend to "communications 'made for the purpose

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Shield of Greater N.Y., 73 N.Y.2d 588, 542 N.Y.S.2d 508, 540 N.E.2d 703 (1989) (New York law considers the legal advice which includes information by third parties in its analysis as privileged depending on the circumstances).

175. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (Discussion Draft 1980), [hereinafter MODEL RULES].

176. MODEL RULES, *supra* note 175, Rule 3.3.

177. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (c)(4) (1983) [hereinafter MODEL CODE].

178. MODEL RULES, *supra* note 175, Rule 1.6(b)(2). *See also* Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194-95 (2d Cir. 1974), *cert. denied*, 419 U.S. 998 (1974) (holding that attorney had a right to disclose privileged information necessary to defend himself against accusation of wrongful conduct).

179. MODEL CODE, *supra* note 177, DR 4-101 (c)(4); MODEL RULES, *supra* note 175, Rule 1.6 (b)(2); *See also* Sullivan v. Chase Investment Services of Boston, Inc., 434 F. Supp 171, 188-90 (N.D. Cal. 1977). *See generally* Jennifer Cunningham, *Eliminating "Backdoor" Access To Client Confidences: Restricting the Self-Defense Exception to the Attorney-Client Privilege*, 65 N.Y.U. L. REV. 992 (1990).

of getting advice for the commission of a fraud' or crime."<sup>180</sup> The privilege must give way to the stronger social policy of prohibiting the concealment of wrongdoing, "otherwise instrumentalities and fruits of crime would be beyond the reach of the law by the mere fact that a defendant turned them over to an attorney."<sup>181</sup> The purpose of the attorney-client privilege "ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*."<sup>182</sup> This is known as the crime-fraud exception to the attorney-client privilege and it applies only to "future or ongoing fraud"; communications remain privileged where they relate to past or completed crimes or frauds.<sup>183</sup> It is not necessary that the lawyer be aware of the client's intention to commit a qualifying crime or fraud to invoke the exception.<sup>184</sup> Although the exception focuses

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180. See, e.g., *United States v. Zolin*, 491 U.S. 554, 563 (1989); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir. 1992); *In re John Doe Corp.*, 675 F.2d 482, 491 (2d Cir. 1982); *Regina v. Cox*, 14 Q.B.D. 153 (1884) (establishing the crime-fraud exception). The majority of states have upheld the crime-fraud exception. See, e.g., *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 607 (Mo. 1993); *Central Constr. Co. v. Home Indemnity Co.*, 794 P.2d 595, 597 (Alaska 1990); *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987); *People v. Paasche*, 525 N.W.2d 914, 917 (Mich. Ct. App. 1994); *Geilim v. Superior Court*, 285 Cal. Rptr. 601 (Cal. Ct. App. 1991); *Bersani v. Bersani*, 565 A.2d 1368, 1371-72 (Conn. Super. Ct. 1989); *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982).

181. *People v. Investigation into a Certain Weapon*, 448 N.Y.S.2d 950, 953 (Sup. Ct. Kings Co. 1982). See also David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 458-59 (1986).

182. *Haines*, 975 F.2d at 84 (citing WIGMORE, *supra* note 81, § 2298 at 573) (emphasis in original).

183. *In re Grand Jury Proceedings (Appeal of FMC Corp.)*, 604 F.2d 798, 803 (3d Cir. 1979) (noting the need to be careful to distinguish between past wrong and continuing wrong). See also *Craig v. A.H. Robins Co.*, 790 F.2d 1, 3-4 (1st Cir. 1986). But see *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 154-55 (D. Del. 1977) (holding that communications after the fact of a crime are protected, to allow a defendant her proper right to consultation necessary to establish a legal defense.); *In re Murphy*, 560 F.2d 326, 339 (8th Cir. 1977) (holding that where the party seeking discovery fails to provide any evidence of wrongdoing, the confidential information is not discoverable).

184. See, e.g., *United States v. Soudan*, 812 F.2d 920 (5th Cir. 1986) (holding that a party seeking to defeat a claim of privilege using the crime-fraud exception need not prove the lawyer's wrongfulness in addition to the client's misconduct). See also *United States v. Laurins*, 857 F.2d 529, 540 (9th Cir. 1988). See generally Fried, *supra* note 181, at 443.

primarily on the client's intentions, the qualifying wrong can sometimes be that of the attorney.<sup>185</sup>

The crime-fraud exception has been applied to attorney work product as well as to communications otherwise within the ambit of the attorney-client privilege.<sup>186</sup> However, where the exception is applied to opinion work product, the attorney's knowledge of the fraud is required to support the application of the waiver.<sup>187</sup>

#### 4. *In Camera* Review

To overcome the presumption that a privilege exists,<sup>188</sup> there must be a prima facie showing of evidence sufficient to "give colour to the [allegation of fraud]."<sup>189</sup> Recent cases have interpreted this standard to mean that only a "foundation in fact" sufficient to support the allegation of fraud and that the otherwise privileged communication was designed to be in fur-

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185. *In re Sealed Case*, 676 F.2d 812-13 (D.C. Cir. 1982) (holding that misconduct by an attorney, as well as misconduct by the client negates the privilege). See also *United States v. King*, 536 F. Supp. 253, 261-62 (D.C. Cal. 1982).

186. See Andrea L. Borgford, Comment, *The Protected Status of Opinion Work Product*, 68 WASH. L. REV. 881 (1993). See, e.g., *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982) (finding probable cause to believe omission in business report concealed a criminal scheme of ongoing bribery to justify the disclosure of an attorney's work product); *Bulk Lift Int'l, Inc. v. Flexcon Systems, Inc.*, 122 F.R.D. 493, 496 (W.D. La. 1988) (holding in patent infringement suit, where attorney omitted relevant evidence in a patent which was relied on by the PTO sufficient to support prima facie showing of assistance of counsel in furtherance of fraud); *In re A.H. Robins Co., Inc.*, "Dalkon Shield" IUD Product Liability Litig., 107 F.R.D. 2 (Kan. Dist. Ct. 1985) (ordering disclosure of some memoranda upon plaintiffs' showing that the crime-fraud exception applied because defendant employed assistance of counsel to cover up known defects in product liability action against manufacturer of intrauterine birth control device); *Sealed Case*, 676 F.2d at 793, 812-13 (holding substantial possibility that the corporation client's use of its former general counsel's work product in furtherance of a crime, to bribe an official and defraud the government, was sufficient to negate the privilege and force the disclosure of the documents); *In re Grand Jury Proceedings*, 529 F. Supp. 8, 10 (E.D. Mich. 1981) (finding subpoenaed materials, although compiled in previous, terminated litigation, were made to further criminal activity and therefore not protected work product).

187. *In re National Mortgage Equity Corp.*, 116 F.R.D. 297 (C.D. Cal. 1987).

188. Fried, *supra* note 181, at 482.

189. *Clark v. United States*, 289 U.S. 1, 14-15 (1933). See also *In re Impounded Case*, 879 F.2d 1211, 1214 (3d Cir. 1989); *In re Grand Jury Proceedings (FMC)*, 604 F.2d 798, 802 (3d Cir. 1979).

therance of that fraud is necessary.<sup>190</sup> Such a showing is "characterized as an intermediate burden of proof," and is made necessary because of the difficulty in establishing a *prima facie* case of fraud at the discovery stage.<sup>191</sup> The crime or fraud need not be proven, so long as sufficient probable cause is shown to support a belief that the communications were intended to facilitate or conceal criminal activity.<sup>192</sup>

In making a final determination as to the applicability of the privilege where there are contested claims of whether it applies, the trial court may review the allegedly privileged information *in camera*.<sup>193</sup> Even where a claim is well substantiated, the waiver of the privilege is not "self operative" and it is within the court's discretion whether to disclose a privileged document.<sup>194</sup> *In camera* inspection imposes a lesser burden on the defendant than a full determination that the exception applies,<sup>195</sup> as it "is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure."<sup>196</sup> The evidentiary standard necessary to obtain an *in camera* review may be met by a showing of some factual basis that *in camera* review of the materials may reveal evidence sufficient to establish the applicability of an exception to or waiver of the privilege.<sup>197</sup>

The courts have broadened the crime-fraud exception by steadily lowering the quantum of evidence necessary for its application, allowing the use of the confidential communication itself to provide the necessary showing, and by the continuous

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190. *Caldwell v. Dist. Ct.*, 644 P.2d 26, 33 (Colo. 1982). See also *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d. Cir. 1992).

191. *Fried, supra* note 181, at 463-64 (citing *Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1222 (Colo. 1982)).

192. *In re Antitrust Grand Jury Advance Publications, Inc. v. United States*, 805 F.2d 155, 164-66 (6th Cir. 1986). See also *Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32 (2d Cir. 1986).

193. *United States v. Grand Jury Investigations*, 401 F. Supp. 361, 367 (W.D. Pa. 1975). "A judicial proceeding is said to be heard 'in camera' either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom." *BLACKS LAW DICTIONARY* 760 (6th ed. 1990).

194. See, e.g., *In re Grand Jury Proceedings (Schofield)*, 721 F.2d 1221, 1223 (9th Cir. 1983).

195. *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 690 (D.N.J. 1992).

196. *United States v. Zolin*, 491 U.S. 554, 572 (1989) (quoting *Fried, supra* note 181, at 467).

197. *Fried, supra* note 181, at 463, 468-70.

growth of the list of predicate crimes which trigger the exception.<sup>198</sup> The terms "fraud" or "crime" have been interpreted to mean tortious as well as criminal activity.<sup>199</sup> Courts have given the crime-fraud exception broad interpretation such that "[a]cts constituting fraud are as broad and as varied as the human mind can invent."<sup>200</sup>

#### F. *Ethical Obligations of the Attorney*

The narrowing of the scope of the attorney-client and work product privileges by the courts' increased application of waivers and exceptions is contemporaneous with a reexamination of the ethical rules of confidentiality. The lawyer has an ethical obligation to guard the confidences of his client,<sup>201</sup> whether the client is an individual or a corporate entity.<sup>202</sup>

The ethical entitlement of an attorney to disclose a client's wrongdoing creates some tension with the duty of confidentiality.<sup>203</sup> The commission that drafted the Model Rules interpreted Canon 37's obligation to disclose wrongful intentions as taking precedence over the general duty of confidentiality, except when the information is privileged.<sup>204</sup>

In 1977, the American Bar Association formed the Commission on Evaluation of Professional Standards to reexamine and reform the Canon of Ethics.<sup>205</sup> One result of this reexamination

198. *Id.* at 469-70.

199. *Volcanic Gardens Management v. Poxson*, 847 S.W.2d 343 (Tex. Ct. App. 1993). There is a trend toward expanding the reach of the exception by "defining as 'crime' many sorts of wrongdoing that do not qualify as civil fraud by traditional standards." Fried, *supra* note 181, at 445.

200. *In re Callan*, 300 A.2d 868, 877 (N.J. Super Ct. Ch. Div. 1973), *aff'd per curiam*, 312 A.2d 881 (N.J. Super. Ct. App. Div. 1973), *rev'd on other grounds*, 331 A.2d 612 (N.J. 1975).

201. MODEL RULES, *supra* note 175, Rule 1.6 (1983) ("A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation . . ."); MODEL CODE, *supra* note 177, DR 4-101 (1980) (a lawyer is prohibited from revealing "secrets or confidences" of the client).

202. MODEL RULES, *supra* note 175, Rule 1.13 (1983).

203. MODEL CODE, *supra* note 177, DR 4-101 (c)(3) (permitting an attorney to reveal "the intention of his client to commit a crime and the information necessary to prevent the crime."). *See also*, CANONS OF PROFESSIONAL ETHICS, Canon 37 (1967) (excluding the intention of a client to commit a crime from the confidences the attorney is bound to respect).

204. *See* Fried, *supra* note 181, at 493 n.278-83.

205. *Id.* at 494.



of the Canon of Ethics was the replacement of compulsory disclosure of client wrongdoing with permissive disclosure, emphasizing the prevention of substantial harm over the prevention of mere misconduct.<sup>206</sup> Once aware of any wrongful intentions, the attorney has an ethical obligation to exert reasonable efforts to prevent violations of the law.<sup>207</sup>

A lawyer may continue in the representation of a client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not knowingly assist the client in illegal conduct or take a frivolous legal position.<sup>208</sup> Where the corporation is the client,<sup>209</sup> and the attorney knows an employee of the corporation is engaged in or intends to engage in illegal conduct, Rule 1.13(b) requires the attorney to "proceed as is reasonably necessary in the best interest of the organization."<sup>210</sup> Where such representation would require an illegal act or ethical violation on the part of the lawyer, the ethical rules mandate that the lawyer withdraw.<sup>211</sup>

"[T]he recognition of a privilege does not mean it is without conditions or exceptions."<sup>212</sup> It is the "function of the court" to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the "judicial process."<sup>213</sup>

The ethical obligation of an attorney to reveal false evidence is not in conflict with the attorney-client privilege "for implicit in the promise of confidentiality is its nonapplicability where the client seeks the unlawful end of corrupting the judi-

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206. MODEL RULES, *supra* note 175, Rule 1.6(b) (Proposed Final Draft 1981).

207. See *In re Grand Jury Subpoena (David Doe)*, 551 F.2d 899, 901 (2d Cir. 1977). For a discussion of the attorney's duty to report wrongdoing, see generally Kramer, *Clients' Frauds and Their Lawyer's Obligations: A Study in Professional Irresponsibility*, 67 GEO. L. J. 991 (1979).

208. Hellerstein, *supra* note 81 (citing IV Legal Times of Washington, No. 27, Dec. 7, 1981, at 25).

209. The corporation and its employees (both current and former) are all recognized by the courts as "clients" for purposes of the privilege. See *supra* notes 133-39 and accompanying text.

210. MODEL RULES, *supra* note 175, Rule 1.13(b).

211. *Id.* Rule 1.16(a). See also *id.* Rule 1.2(d) (lawyer not required to engage or assist client in criminal or fraudulent activities). But see *id.* Rule 1.2(d), (e) (encourages the lawyer to properly advise the client of the potential consequences).

212. *Clark v. United States*, 289 U.S. 1, 13 (1933).

213. *Id.*

cial process by false evidence.”<sup>214</sup> Therefore, the caselaw, the Federal Rules of Civil Procedure and the ethical rules recognize an attorney’s role as advocate as well as his obligation to protect the fundamental fairness of the judicial system.<sup>215</sup>

#### IV. Tobacco Litigation

For nearly three decades, the tobacco industry, unlike the asbestos industry,<sup>216</sup> has managed to shield itself from lawsuits.<sup>217</sup> Simultaneously, “neither Congress nor the FDA has . . . altered its traditional hands-off approach to regulating tobacco” for over thirty years.<sup>218</sup> While the FDA regulates food, drugs and cosmetics, it has failed to identify tobacco products as drugs.<sup>219</sup> As a result, the tobacco industry is the only industry in the nation allowed to add chemicals to its products without listing these additives as ingredients or establishing their safety or efficacy.<sup>220</sup>

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214. Hellerstein, *supra* note 81 (quoting ABA opinion 87-353 at 6 (1987)).

215. See *People v. Belge*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (4th Dep’t 1975), *aff’d per curiam* 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

216. See Popescu, *Cigarettes & Asbestos: A Tale of Two Industries*, HOSP. PRACT., May 1983, at 250. While tobacco companies have managed to avoid liability and cigarette smoking has not been directly linked to certain diseases, the asbestos industry has been held completely liable where asbestos has been directly linked to lung disease. *Id.* The asbestos companies have used the “empty chair defense,” to mitigate their damages by pointing to an empty chair and claiming the tobacco companies should also be parties to the action. *Id.* at 254.

217. Clifford E. Douglas, *The Tobacco Industry’s Use of Nicotine as a Drug*, A.C.S.H. (May 1994) [hereinafter Douglas]. Two major factors contributed to the tobacco industry’s shield: The Federal Cigarette Labeling and Advertising Act, which by requiring warning labels on cigarette packages and advertisements provided the industry with the defense of assumption of the risk; and the adoption of the RESTATEMENT (SECOND) OF TORTS § 402A (1965), which by not recognizing tobacco as unreasonably dangerous barred state strict liability claims by injured smokers. Michael J. Hannan III, Note, *The Effect of Cipollone: Has the Tobacco Industry Lost its Impenetrable Shield?*, 23 GA. L. REV. 763, 771-72 (1989) [hereinafter Hannan].

218. Douglas, *supra* note 217, at 4.

219. *Id.* at 2-3. The two requirements for tobacco to be considered a drug are evidence of physiological effects of product on the human body and deliberate intent by manufacturers to affect consumers with such product; the second requirement is lacking for the FDA. *Id.*

220. Transcript, ABC’s DAY ONE, March 7, 1994, at 1. The list of additives in cigarettes provided to government officials by law every year “is kept under lock and key,” safe from everyone save the few designated employees in the Department of Health and Human Services. *Id.* at 3.

The tobacco industry has enjoyed a record of success in civil litigation unique to almost any industry, never paying one cent in settlements or awards for any injuries claimed by cigarette smokers in their civil lawsuits.<sup>221</sup> Out of three hundred cases examined since the 1950s, only two cases<sup>222</sup> against a tobacco company have ever resulted in a judgment favoring the plaintiff.<sup>223</sup> The tobacco industry has maintained this sterling record in remaining exempt from civil liability, even though its products allegedly kill 400,000 Americans every year.<sup>224</sup>

### A. *The Tobacco Industry's Defense Strategy*

Throughout the examined history of litigation in which the tobacco industry has been a defendant, the industry has adopted a no-compromise litigation unique in the annals of tort litigation.<sup>225</sup> This strategy is illustrated in a statement made by J. Michael Jordan, general counsel for R.J. Reynolds ("RJR"), in a memo describing the aggressive posture the industry has taken: "[T]o paraphrase General Patton, the way we won these cases was not by spending [RJR]'s money, but by making that other son of a bitch spend all of his."<sup>226</sup> The industry's strategy was simple: "Never retreat on any position and attack when-

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221. See Hannan, *supra* note 217, at 763; Douglas M. Jacobson, Note, *After Cipollone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?*, 38 AM. U. L. REV. 1021, 1023-24 (1989) [hereinafter Jacobson]. The tobacco companies supplied the government with a list containing approximately 700 ingredients in cigarettes, including 13 banned in food. Steve Weinberg, *Hardball Discovery*, 81 A.B.A. J. 66, 69 (1995).

222. See *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208, 210 (D.N.J. 1988); *Carter v. Brown & Williamson*, No. 95-00934 (Circ. Ct., Duval County, Fla. Aug. 9, 1996).

223. *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 428 n.31 (D.N.J. 1993).

224. TESTIMONY OF JAMES GLENN, CHAIRMAN, COUNCIL FOR TOBACCO, BEFORE STAFF OF HOUSE SUBCOMM. ON HEALTH AND THE ENV'T, 103D CONG., *Tobacco Products* (Fed. News Serv.) (May 26, 1994) [hereinafter TESTIMONY OF GLENN].

225. Robert L. Rabin, *A Sociological History of the Tobacco Litigation*, 44 STAN. L. REV. 853, 857 (1992) [hereinafter Rabin]. Generally, most accident and product liability claims result in settlement, but unlike in the asbestos, Dalkon Shield and DES cases, the cigarette cases have never been settled. *Id.*

226. *Haines*, 814 F. Supp. at 421 (quoting Opp. Brief at 8). The statement was contained in an internal memorandum, dated April 29, 1988 directed to other industry attorneys. *Id.*

ever possible . . . ."<sup>227</sup> In 1989, William E. Townsley and Dale K. Hanks described this litigation strategy as follows:

[The tobacco companies] have done this by *resisting all discovery aimed at them*, thus requiring a court hearing and order before plaintiffs can obtain even the most rudimentary discovery. They have done it by *getting confidentiality orders* attached to the discovery materials they finally produce, thus preventing plaintiffs' counsel from sharing the fruits of discovery and forcing each plaintiff to reinvent the wheel. They have done it by taking *exceedingly lengthy oral depositions* of plaintiffs and by *gathering*, through written deposition, *every scrap of paper* ever generated *about a plaintiff*, from cradle to grave. And they have done it by taking *endless depositions* of plaintiffs, expert witnesses, and by *naming multiple experts* of their own for each specialty, such as pathology, thereby putting plaintiffs' counsel in the dilemma of taking numerous expensive depositions or else not knowing what the witness intends to testify to at trial. And they have done it by *taking dozens and dozens of oral depositions*, all across the country, *of trivial fact witnesses*, particularly in the final days before trial.<sup>228</sup>

The key to this strategy was to remain on the offensive at all times by denying every claim on the health hazards of smoking<sup>229</sup> and concealing all damaging research results from the public.<sup>230</sup> The tobacco industry's "impenetrable shield" remained strong for several reasons, including a public policy biased against former and current smokers, the high cost of cigarette litigation, the inability to find a legal theory that would hold the cigarette companies liable, and the tenacious defense work by the industry attorneys.<sup>231</sup> As the history of the tobacco litigation demonstrates, this "stone-wall" defense has been successful over the last forty years.<sup>232</sup>

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227. Mark Curriden, *The Heat is On*, 80 A.B.A. J. 58, 59 (1994) [hereinafter Curriden].

228. Plaintiffs' Reply Brief app. A, at 1-2, *Castano v. The American Tobacco Co., et al.*, (E.D. La. 1994) (No. 94-1044) (quoting William E. Townsley et al., *The Trial Court's Responsibility To Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W. L. REV. 275, 277 (1989) (emphasis in original)).

229. Curriden, *supra* note 227, at 60.

230. Linda Himmelstein et al., *Did Big Tobacco's Barrister Set Up a Smokescreen?*, BUS. WK., Sept. 5, 1994, at 69 [hereinafter Himmelstein].

231. Hannan, *supra*, note 217, at 763; Jacobson, *supra* note 221, at 1021-23.

232. Castano Appendix A, *supra*, note 44, at 1. See generally Rabin, *supra* note 225, at 857-58.

B. *The Formation of the Council for Tobacco Research*

The early 1950s brought news of specific health risks associated with smoking, where scientific findings established a persuasive link between smoking and lung cancer.<sup>233</sup> These findings were soon published in widely read magazines, including *The Reader's Digest*.<sup>234</sup> In response, on December 15, 1953, the chief executive officers ("CEO's") of all the leading United States tobacco companies met along with the industry's primary public relations firm, Hill & Knowlton ("H&K"), to respond to these health criticisms.<sup>235</sup> Confidential documents ("H&K documents"), written by top officials at H&K, subsequently obtained by the Congressional Subcommittee on Health & the Environment, describe in detail the campaign undertaken from 1954 through 1956 by the tobacco industry to favorably influence public opinion.<sup>236</sup> H&K recommended a step-by-step program of product rehabilitation including the formation of the Tobacco Industry Research Committee, later to be called the Council for Tobacco Research ("CTR")<sup>237</sup> to sponsor and finance research on smoking and health, and the creation of the Scientific Advisory Board<sup>238</sup> to guide these research objectives.<sup>239</sup> The CTR published "A Frank Statement to Cigarette Smokers" assuring smokers that the tobacco industry placed a paramount interest in consumers' health, and pledged funding and assistance for

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233. Included in these findings was the research results of an American Scientist, Dr. Ernest Wynder and a British Scientist, Professor Richard Doll, who established that tobacco smoke is carcinogenic. Transcript, PANORAMA'S PACK OF LIES, Feb. 19, 1993, at 994 [hereinafter PACK OF LIES].

234. Roy Norr, *Cancer by the Carton*, READER'S DIGEST, Dec. 1952, at 7.

235. STAFF OF HOUSE SUBCOMMITTEE ON HEALTH AND THE ENV'T, 103D CONG., THE HILL & KNOWLTON DOCUMENTS: HOW THE TOBACCO INDUSTRY LAUNCHED ITS DISINFORMATION CAMPAIGN, Exhibit 2, at 1 (Comm. Print May 26, 1994) [hereinafter HOUSE SUBCOMMITTEE PRINT]. In attendance were CEO's of R. J. Reynolds, Philip Morris, U.S. Tobacco Company, Brown & Williamson, Benson & Hedges and American Tobacco Corporation. *Id.*

236. See Castano Appendix A, *supra* note 44, at 2-3.

237. By the early 1960's the Tobacco Research Commission divided into the Tobacco Institute for public relations matters, and the CTR for scientific research. See *supra* note 44, Exhibit 17, at 6. TESTIMONY OF GLENN, *supra* note 224.

238. The Scientific Advisory Board is made up of 15 individuals, five of which hold Ph.D. or equivalent degrees in the medical sciences. TESTIMONY OF GLENN, *supra* note 224.

239. *Id.*

research into the health effects of smoking.<sup>240</sup> However, the H&K documents revealed that the formation of this committee was merely a public relations ploy.<sup>241</sup> As one member of the Scientific Advisory Board observed "less than one-tenth of the funds awarded [by CTR] are awarded for the scientific study of tobacco-related effects."<sup>242</sup>

### C. *The First Wave of Tobacco Litigation*

The first wave of litigation against cigarette manufacturers began in the 1950s and early 1960s in response to the published findings on the health risks of smoking.<sup>243</sup> The tobacco companies prevailed in these early cases because plaintiffs were unable to prove a causative link between smoking and cancer;<sup>244</sup> foreseeability, in tort or warranty, was an issue of proof which

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240. HOUSE SUBCOMMITTEE PRINT, *supra* note 235, Exhibit 4, at 6.

241. TESTIMONY OF GLENN, *supra* note 224. A memorandum written by Bert C. Gross of H&K describes the formation of the committee as sponsoring a "public relations campaign which is entirely pro-cigarettes." *Id.* Another H&K memo states that the "organization be created for explicitly public relations, not scientific purposes," to calm public fears. *Id.* But see A 1978 interoffice memorandum, written by Ernest Pepples, then general counsel at Brown & Williamson, described the CTR as "a public relations effort" engaging only in research "in a non-directed and independent fashion as contracted work either in-house or under a B & W contract which, if it goes wrong can become the smoking pistol in a lawsuit." *Id.* In response to these assertions, Dr. Glenn, then chairman of the CTR, testified under oath that the CTR has no public relations functions as do other organizations primarily because it is funded by the tobacco industry. *Id.*

242. TESTIMONY OF GLENN, *supra* note 224 (quoting PACK OF LIES *supra* note 238). Dorothea Cohen, a librarian at the CTR for twenty-four years, stated that "[w]hen the Center . . . found out that cigarettes were bad and it was better not to smoke, [CTR did not] publicize that [information in the press and instead organized to] . . . lobby for cigarettes." *Id.* A July 1991 article in the *American Journal of Public Health* cites that "[m]ost of the CTR-funded grants supported biomedical research not related to health consequences of smoking [whereby] almost 80 [%] of the [investigations funded by CTR grants in 1989] indicated that none of their research, current or past, examined the health effects of smoking . . . ." *Id.* (quoting AM. J. PUB. HEALTH (July 1991)).

243. See Jacobson, *supra* note 221, at 1030.

244. See, e.g., *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1991), *aff'd on reh'g*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966) (a lung cancer-smoking case brought on theories of negligence and breach of warranty, where the plaintiff dismissed the case after thirteen years of litigation, including two trials, two appeals and two petitions for certiorari due to lack of resources to overcome the "insurmountable" problems of proof). See also *Mitchell v. American Tobacco Co.*, 183 F. Supp. 406 (M.D. Pa 1960) (where plaintiffs eventually dropped their cases after obtaining favorable pretrial rulings).

plaintiffs were unable to overcome.<sup>245</sup> From the outset, the tobacco companies exploited a number of tactical advantages, such as using their financial resources to employ expert witnesses and endure lengthy litigation, retaining counsel from the largest and most experienced law firms<sup>246</sup> in the nation to outman and out-gun the plaintiff's personal injury attorneys, as well as their possession of all of the research done and data generated on the health risks of smoking.<sup>247</sup> Consequently, only a handful of these cases made it to trial, and none were successful in imposing civil liability upon any tobacco industry player.<sup>248</sup>

#### D. *The Second Wave of Tobacco Litigation*

The United States Surgeon General issued the first major study revealing the dangers of smoking in 1964.<sup>249</sup> The following year congressional hearings were held which lead to the Federal Cigarette Labeling and Advertising Act,<sup>250</sup> requiring that all cigarette labels, packages, and advertisements carry a warning to consumers regarding the risks of smoking.<sup>251</sup> Despite these events and changes in plaintiffs' litigation strategy,

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245. See, e.g., *Hudson v. R.J. Reynolds*, 427 F.2d 541 (5th Cir. 1970) (per curiam) (affirming the district court's summary judgment in favor of the defendant manufacturer due to the plaintiff's failure to prove the foreseeability of the hazards of smoking). See, e.g., *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963), cert. denied, 375 U.S. 865 (1963). The Court held that the manufacturer is "an insurer against foreseeable risks, not against unknowable risks." *Id.* at 37.

246. One such firm is Shook, Hardy & Bacon, a Kansas City, Missouri law firm described as the "law firm of choice for many companies plagued by high-status and often controversial product liability woes." Himmelstein, *supra* note 230, at 68. While primarily an insurance defense firm, it provided expertise in complex litigation with the number of scientists and experts it hired from various fields. *Id.* Included in their list of clients are Upjohn Company, Merck, Bristol-Myers Squibb, Marion Merrill Dow and Occidental Petroleum, as well as Philip Morris, B&W and Lorillard. *Id.*

247. Rabin, *supra* note 225, at 857-60.

248. *Id.* at 859. This harsh reality in tobacco litigation is best illustrated in *Thayer v. Liggett & Myers Tobacco Co.*, No. 5314, slip op. (W.D. Mich. Feb. 20, 1970) (where plaintiffs dropped the case due to its "prohibitive costs," after numerous delays, multiple defense motions and granting the defendant a protective order which insulated all of the defendant's alleged trade secrets and other confidential information).

249. TESTIMONY OF GLENN, *supra* note 224. United States Surgeon General Luther Terry published his report declaring that smoking is a cause of lung cancer. *Id.*

250. 15 U.S.C. §§ 1331-41 (1994).

251. *Id.*

the "cigarette liability shield" remained unbroken.<sup>252</sup> The federally required warnings gave rise to the defense of common knowledge of the hazards of smoking, so that the now allegedly informed users of tobacco products assumed wholesale responsibility for their tobacco-related illnesses.<sup>253</sup> Similarly, changes in products liability law providing for strict liability had little impact on the cigarette manufacturers, since the courts had categorized cigarettes as "not unreasonably dangerous," as is required by the law.<sup>254</sup> The tobacco industry maintained its winning streak into the 1980s, and "all those who have attempted to prove the evil effects of tobacco have failed to establish a valid scientific case . . . ."<sup>255</sup>

The late 1980s produced a second wave of smoking litigation,<sup>256</sup> just as the asbestos litigation was reaching a climax.<sup>257</sup> This second wave of cases marked a number of changes, including the coordination of efforts among plaintiffs and their pooling of resources<sup>258</sup> as well as significant changes in products liability law.<sup>259</sup> The early 1980s became an era of strict liability for defective products, and courts began to apply comparative fault theory to product defect cases.<sup>260</sup>

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252. Hannan, *supra* note 217, at 770.

253. See Rabin, *supra* note 225, at 875.

254. RESTATEMENT (SECOND) OF TORTS § 402 cmt. n (1965). See generally Levin, *The Liability of Tobacco Companies-Should Their Ashes Be Kicked?*, 29 ARIZ. L. REV. 195, 204-08 (1987).

255. Emmanuele Nneji, *Products Liability: Breaking Through the Cocoon of the Cigarette Industry*, 9 IN PUB. INTEREST 43, 52 (1989) [hereinafter Nneji] (quoting E. NORTHROP, *SCIENCE LOOKS AT SMOKING* 117, 174 (1957)).

256. Rabin, *supra* note 225, at 864-65.

257. For an analysis of the asbestos litigation through the mid-1980s, see DEBORAH R. HENSLEY ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS*, 20-21 (1985). See also *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (holding asbestos manufacturer to the standard of experts). This case eventually became the cornerstone of asbestos litigation.

258. See, e.g., *Horton v. American Tobacco Co.*, 16 Prod. Safety & Liab. Rep. (BNA) at 227 (Miss. Cir. Ct. Mar. 4, 1988); *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335 (3rd Cir. 1987) (handled by a team of attorneys who developed an expertise on causal link of smoking and cancer and had similar pending cases). See also Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 90, 92 (1986) (noting that groups of law firms often litigate together on plaintiff's behalf).

259. For a general discussion of the developments in product liability law, see Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 797-811 (1983).

260. Edell, *supra* note 258, at 92.



### 1. *Cipollone v. Liggett*

The information necessary to establish the hazards of smoking and the liability of the various cigarette manufacturers were at issue in the most celebrated of the "second wave" cases, *Cipollone v. Liggett Group, Inc.*<sup>261</sup> Rose Cipollone, a smoker for forty years developed lung cancer, necessitating the removal of her right lung,<sup>262</sup> in a case which attracted national attention from the media and Congress.<sup>263</sup> Mrs. Cipollone and her husband filed a fourteen-count complaint against Liggett Group, Inc. ("Liggett"), Philip Morris, Inc. ("Philip Morris") and Lorillard, the manufacturers of the cigarettes that Rose Cipollone had smoked.<sup>264</sup> The allegations included theories of strict liability, negligence, breach of warranty, intentional tort,<sup>265</sup> and conspiracy.<sup>266</sup> During pretrial litigation, Rose Cipollone died from

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261. 683 F. Supp. 1487 (D.N.J. 1988). The *Cipollone* case was part of a group of eight to ten smoker-victim cases filed in New Jersey in 1983, including *Cipollone v. Liggett Group, Inc., et al.*, No. 83-2864 (D.N.J. Sept. 11, 1992); *Dewey v. R.J. Reynolds Tobacco Co., et al.*, No. L-071733-81 (N.J. Super. Ct. Law Div. Dec. 22, 1986); *Berko v. R.J. Reynolds Tobacco Co., et al.*, 246 N.J. Super. 348 (App. Div. 1991); *Barnes v. R.J. Reynolds Tobacco Co., et al.*, 246 N.J. Super. 348 (N.J. Super. Ct. App. Div. 1991); *Smith v. R.J. Reynolds Tobacco Co., et al.*, No. L-059921-84 (N.J. Super. Ct. Law Div.); and *Haines v. Liggett Group, Inc., et al.*, No. 84-678 (A.J.L.) (D.N.J. Jan. 26 1993). Throughout the ten years of litigation in *Cipollone*, there were "over one hundred motions, four interlocutory appeals, one final appeal and two petitions for certior[ari] filed . . ." *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 n.15 (D.N.J. 1993).

262. *Cipollone*, 683 F. Supp. at 1489-90.

263. See Mintz & Gladwell, *Legal Battle Between Tobacco Firms, Opponents Won't End Anytime Soon*, WASH. POST, June 15, 1988, at H1, col. 3 (referencing *Cipollone* as the most heavily publicized cigarette case). See also DID LIGGETT FAIL TO SELL A 'SAFER' CIGARETTE & WILL B.A.T. INDUSTRIES THWART THE ANTISMOKING POLICY OF FARMERS GROUP?: HEARINGS BEFORE THE SUBCOMMITTEE ON TRANSPORTATION, TOURISM AND HAZARDOUS MATERIALS OF THE HOUSE COMM. ON ENERGY & COMMERCE, 100th Congress, 2d Session (1988) (following *Cipollone*, Congressional hearings were held regarding claims of conspiracy and failure to sell a safer cigarette).

264. *Cipollone*, 683 F. Supp. at 1489-90.

265. *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 667 (D.N.J. 1986), *aff'd in part and rev'd in part*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 749 U.S. 1043 (1987). Count Six alleged that the defendant intentionally, willfully and wantonly attempted to neutralize the adverse effects of smoking through their advertising. *Id.* at 673.

266. *Id.* at 673. Count Eight alleged that the cigarette manufacturers were in possession of medical and scientific data confirming that cigarettes caused health problems, but conspired to deprive the public of this information. *Id.*

her lung cancer,<sup>267</sup> and her husband, Antonio, continued to prosecute her claims individually and as executor of his wife's estate.<sup>268</sup>

For the first time, a pretrial ruling compelled the tobacco industry to release thousands of pages of confidential internal documents<sup>269</sup> sought by the plaintiffs to prove that a conspiracy existed among the tobacco companies to prevent the release of damaging information on the health hazards of cigarette smoking.<sup>270</sup> In another pretrial decision in *Cipollone*, the defendant cigarette manufacturers obtained a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure to prevent the release of these documents for use in future litigation against the tobacco companies.<sup>271</sup> The magistrate to the present litigation granted the protective order which limited the use of the documents to the present litigation and prohibited the disclosure of any information to third parties without the defendants' consent.<sup>272</sup> Judge Sarokin of the New Jersey District Court modified this protective order in part, because of the strong public interest in the risks of smoking which outweighed the defendants' interest in confidentiality.<sup>273</sup> On the defendants' appeal to the Third Circuit, the court issued a writ of mandamus based on the district court's "clear error of law" in applying an incorrect, overly stringent standard of review in considering the protective order.<sup>274</sup>

On remand, the district court once again found that the tobacco companies failed to demonstrate "good cause" for protecting the nonconfidential material from public disclosure.<sup>275</sup> In a supplemental opinion, the court modified the protective order to

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267. *Cipollone*, 683 F. Supp. at 1490.

268. *Cipollone*, 789 F.2d 181, 183 (3d Cir. 1986), cert. denied, 478 U.S. 1043 (1987).

269. See also Laurie P. Cohen, *Cracks Seen in Tobacco's Liability Dam*, WALL ST. J., June 15, 1988, at 27, col. 3. See generally Jacobson, *supra* note 221, at 1023.

270. *Cipollone*, 649 F. Supp. at 664.

271. *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573, 577 (D.N.J. 1985), *rev'd*, 785 F.2d 1108 (3d Cir. 1986).

272. *Id.* at 577-78.

273. *Id.* at 576-77.

274. *Cipollone*, 785 F.2d at 1118-20 (holding that Rule 26(c) calls for a good cause standard, not the more demanding first amendment analysis).

275. *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 87 (D.N.J. 1986).

allow the use of the confidential internal tobacco company documents in other, related cigarette liability litigation.<sup>276</sup> The plaintiffs presented these documents in an attempt to show that the companies had prior knowledge of the dangers of cigarettes, that they had developed prejudicial internal defense strategies,<sup>277</sup> and that the tobacco industry had concealed damaging research results.<sup>278</sup> The documents released by the defendants were primarily internal documents of the Council for Tobacco Research ("CTR"),<sup>279</sup> and were "filled with disdain for the consuming public and its health."<sup>280</sup> During trial, plaintiffs counsel learned that there remained concealed documents relating to the "Special Projects Division" of the CTR,<sup>281</sup> which directly involved scientific and medical research results on the health hazards directly linked to smoking.<sup>282</sup> Despite evidence that the defendant tobacco companies knew the damaging results of these scientific studies,<sup>283</sup> these "Special Project Division" documents were allegedly withheld under the cover of the attorney-client privilege and the work product doctrine.<sup>284</sup> The issue of the applicability of the crime-fraud exception to these "Special

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276. *Cipollone*, 822 F.2d 335, 337-38 (3d Cir. 1987), *cert. denied*, 479 U.S. 1043 (1987). The tobacco companies requested vacation of the district court ruling and requested the case be reassigned to another "nonbiased" judge, but were denied their requests. *Id.* at 339-40, 347.

277. Jacobson, *supra* note 221, at 1055. One such strategy involved the development of a public relations research group in order to neutralize information linking smoking to health hazards. *Cipollone*, 683 F. Supp. 1490-91.

278. *Cipollone*, 683 F. Supp. 1490-91.

279. *See supra* part IV.B.

280. *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 684 (D.N.J. 1992).

281. This division administered tobacco companies' attorneys to special research projects which would potentially be useful in litigation. *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 85 (3d Cir. 1992). These "special projects" were funded independently by CTR's accounting department. *Id.*

282. *Haines*, 140 F.R.D. at 688. During *Cipollone*, Mark Edell learned from the cross-testimony of Dr. Sheldon Sommer, Scientific Research Director of CTR, that there existed a type of research proposal "that doesn't fit into the Scientific Advisory Board's research program." *Id.*

283. Professor Harris of Harvard Medical School and the Massachusetts Institute of Technology analyzed thousands of pages of research and medical records finding an established link between smoking and cancer, which the tobacco industry chose to ignore for years. Hannan, *supra* note 217, at 786 n.122. The defendant tobacco companies themselves paid Harris \$68,000 for twenty-two days of depositions and research analysis, and were therefore knowledgeable of the results. *Id.*

284. *Haines*, 140 F.R.D. at 684.

Project Division" documents was neither "pressed nor resolved."<sup>285</sup> Upon the evidence presented, the jury rejected the conspiracy and misrepresentation claims, finding that Rose Cipollone had assumed the health risks associated with smoking cigarettes.<sup>286</sup>

## 2. *Haines v. Liggett*

In 1984, in *Haines v. Liggett Group, Inc.*,<sup>287</sup> the plaintiff, Susan Haines as Administratrix of the estate of the deceased Peter F. Rossi, filed a wrongful death action against Liggett, Lorillard, Philip Morris, R.J. Reynolds Tobacco Company ("RJR"), and the Tobacco Institute.<sup>288</sup> Plaintiff, the daughter of the deceased Peter F. Rossi, claimed that he, a smoker for over forty years, developed lung cancer and died as a proximate result of smoking defendants' cigarettes.<sup>289</sup> Plaintiff sued on several grounds<sup>290</sup> including the intentional tort of fraud and conspiracy wherein the defendants allegedly concealed known information regarding the health hazards of smoking and misinformed the public on such risks.<sup>291</sup>

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285. *Id.*

286. *Cipollone*, 693 F. Supp. 208, 210 (D.N.J. 1988). However, Mr. Cipollone was awarded \$400,000 in damages for breach of the express warranty that the cigarettes were safe, collecting the first monetary award ever to be awarded to a plaintiff in a tobacco case. *Id.* See also Jacobson, *supra* note 221, at 1023. Although the verdict for plaintiff was \$400,000 in the Cipollone trial, Mintz & Gladwell, *supra* note 263, the plaintiffs' lawyers spent approximately one million dollars in out-of-pocket expenses and had they filed at their customary rates they would have charged another two million dollars in legal fees. Rabin, *supra* note 225 at 867 n.90; see also *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 418 (D.N.J. 1993). The three firms acting as plaintiffs' counsel spent a combined \$6.2 million over 10 years of representation. Curriden, *supra* note 227, at 59. In comparison defendants spent \$50 million. Castano Appendix A *supra* note 44, at 8 (citing Andrew Blum, *Will Next Round of Smoking Challenges be Worth Pursuing*, NAT'L L. J. June 21, 1988).

287. 975 F.2d 81 (3d Cir. 1992).

288. *Haines*, 814 F. Supp. at 417. The suit against the Tobacco Institute was voluntarily dismissed on Sept. 30, 1992. *Id.* at 417 n.5.

289. *Id.*

290. Those grounds included design defect, failure to warn of the health consequences of smoking, breach of express warranty and claims for fraud and conspiracy. *Id.*

291. *Id.*

To support the fraud and conspiracy theories, Haines sought discovery of internal documents of the CTR.<sup>292</sup> Haines contended that these documents would show that the CTR was a fraudulent public relations ploy, intended only to neutralize information regarding the links established between smoking and disease.<sup>293</sup> Four years later, pursuant to Haines' third discovery request seeking documents related to both the CTR and its Special Project Division,<sup>294</sup> the defendants inundated the plaintiffs with over 2,000 documents<sup>295</sup> but withheld approximately 1,500 special project documents allegedly privileged as attorney-client communications and work product.<sup>296</sup> Haines claimed that these documents were admissible pursuant to the crime-fraud exception, and the district court assigned a special master to review the withheld documents in their entirety and determine whether the exception applied.<sup>297</sup> Pursuant to the defendants' objection to this assignment, while a special master reviewed the documents to decide if the privileges applied, a magistrate considered whether he or a special master should decide the applicability of the exception.<sup>298</sup>

On May 22, 1991, the magistrate made two determinations: 1) that the applicability of the crime-fraud exception was not an appropriate issue for the special master to decide, and 2) that regardless of its applicability, in his opinion, there was an insufficient showing by the plaintiffs to establish the crime-fraud exception to the attorney-client privilege under *Zolin*.<sup>299</sup> The following week the special master filed his report recommending that the attorney-client privilege be applied to these documents.<sup>300</sup>

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292. *Haines*, 975 F.2d at 85.

293. *Id.*

294. See *supra* part IV.D.1. This request for the "special project documents" was prompted by evidence disclosed in *Cipollone v. Liggett Group, Inc.*, a similar pending tobacco related case. *Haines*, 975 F.2d at 85.

295. Included in these documents were correspondence, memoranda, research proposals and research studies. *Haines*, 975 F.2d at 85.

296. *Id.* Defense counsel submitted logs identifying those privileged documents. *Id.*

297. *Haines*, 140 F.R.D. at 685. For discussion of the crime-fraud exception, see *supra* part III.E.3.

298. *Haines*, 975 F.2d at 86.

299. *Id.* at 85-87.

300. *Haines*, 975 F.2d at 86. A report and recommendation was filed on May 29, 1991 by the special master, asserting the applicability of the attorney-client

Haines appealed to the district court from the magistrate's finding and sought to compel discovery of the 1,500 special project documents under the crime-fraud exception.<sup>301</sup> On appeal, Judge Sarokin<sup>302</sup> of the district court ordered the defendant-petitioners to produce all the relevant documents from the record in *Cipollone*,<sup>303</sup> which they did under objection.<sup>304</sup> Sarokin thereby became the first outsider ever to examine the confidential internal documents of the tobacco industry.

While tobacco industry lawyers maintained the independence of the Special Project Division, the companies, in consultation with their attorneys, selectively channeled and disclosed proposed research projects to the public based on their potential value to tobacco defense litigation, creating a protective envelope for damaging information under the guise of the attorney-client privilege.<sup>305</sup> Judge Sarokin found sufficient evidence to warrant an *in camera* review of all the documents, based on the relationship between the CTR and its Special Project Division which strongly suggested a public relations ploy to misrepresent the dangers of smoking to the public.<sup>306</sup> Upon this inspection, Judge Sarokin found that the "defendants specifically abused the attorney-client privilege in their efforts to effectuate their alleged fraudulent scheme" to mislead the public as to the health risks of smoking, and that the "only possible conclusion is that the crime-fraud exception applies to these documents."<sup>307</sup> To support his findings he quoted excerpts from five of the docu-

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privilege to all but eight of the 1,500 withheld documents. *Id.* at 87. The master observed that subsequent to the Federal Cigarette Labeling Act, the CTR began independent funding and administering these special projects, consisting of scientific and medical research relevant to anticipated litigation. *Id.* With the onslaught of tobacco litigation, the special master noted that the CTR retained its own legal department, therefore assuming the documents were generated by attorney-client communications. *Id.*

301. *Haines*, 140 F.R.D. at 684.

302. Judge Sarokin also presided over portions of the *Cipollone* trial. See *supra* part IV.D.1.

303. See *supra* notes 269-73 and accompanying text.

304. *Haines*, 975 F.2d at 87. Petitioners claimed that this information was outside the record considered by the magistrate and was therefore irrelevant to this proceeding. *Id.*

305. *Haines*, 140 F.R.D. at 688.

306. *Id.* But see *supra* part IV.D.1 (discussing the fact that the crime fraud exception was neither pressed nor resolved).

307. *Haines*, 140 F.R.D. at 692.

ments previously reviewed by the magistrate, asserting that "the documents speak for themselves in a voice filled with disdain for the consuming public and its health."<sup>308</sup>

On February 6, 1992 Judge Sarokin issued his opinion<sup>309</sup> reversing the magistrate's determination, finding *prima facie* evidence that the crime-fraud exception applied to at least five of the documents,<sup>310</sup> and ordering the production of at least the quoted excerpts from those documents.<sup>311</sup> This opinion is especially noteworthy for its prologue, in which Judge Sarokin describes the tobacco industry as "the king of concealment and disinformation."<sup>312</sup>

On a petition for a Writ of Mandamus, the Third Circuit vacated the district court order.<sup>313</sup> Finding that the district court improperly considered evidence not before the magistrate

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308. *Id.* at 697. Document #RC-6033263 et seq., was an October 11, 1966 letter from Shook, Hardy & Bacon, which relayed the progress reports on special projects from a September 30, 1966 meeting. *Id.* at 695. Two projects assigned to the CTR and the Tobacco Institute were the responsibility of investigating the "specific refutation of misleading statements regarding the cigarette smoking commonly appearing in anti-smoking propaganda [and the] collection of 'predictions which have not come true.'" *Id.*

Documents #RC-6033468 et seq. and Document #1005122, September 18, 1981 were letters from the law firm Webster & Sheffield, which relayed minutes from a September 10, 1981 general counsel meeting. *Id.* at 695-96. In distinguishing between the CTR projects and the special projects one attorney stated "[w]hen we started the CTR Special Projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR special project. If he did not like it, then it became a lawyers' special project . . . [in order] to protect it under the lawyers." *Haines*, 140 F.R.D. at 696.

Document #01347203 et seq., was a November 6, 1978 memorandum from Donald Hoel regarding the Tobacco Industry Research Committee Meeting of October 26, 1978, including American Tobacco's view of CTR, that it needed to become "more politically oriented," and "more tobacco oriented" with "skeptical scientists." *Id.*

Document #1003718428 et seq., was a November 17, 1978 memorandum from R.B. Seligman to the CTR file regarding a meeting, and described the CTR as having been created as an "industry 'shield' in 1954" (emphasis in original) against the "statistical accusations relating smoking to diseases" that year; special projects were described as "the best way that monies [were] spent and that "CTR has acted as a 'front:'" (emphasis in original) the value to maintain CTR for "public relations purposes" was described as "extremely important . . . to show that [the industry doesn't] agree that the case against smoking is closed." *Id.*

309. *Haines*, 140 F.R.D. 681.

310. *Id.* at 692, 694.

311. *Id.* at 697.

312. *Id.* at 683.

313. *Haines*, 975 F.2d at 93-94.

in making its determination<sup>314</sup> and that Judge Sarokin's appearance of bias necessitated the reassignment of the case to another judge,<sup>315</sup> the Third Circuit emphasized the necessity of ensuring the secrecy of privileged documents, even where the crime-fraud exception is applicable, "until all avenues of appeal are exhausted."<sup>316</sup>

After Judge Sarokin was disqualified in *Haines* for the appearance of bias against the tobacco industry and voluntarily recused himself in *Cipollone*, he stated:

The issue presented to me [in *Haines*] required that I determine whether there was evidence of fraud and misrepresentation, and I made that determination and found that there was. It is difficult for me to understand how a finding based upon the evidence can have the appearance of partiality merely because it is expressed in strong terms . . . I fear for the independence of the judiciary if a powerful litigant can cause the removal of a judge for speaking the truth based upon the evidence, in forceful language that addresses the precise issues presented for determination.<sup>317</sup>

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314. *Id.* at 93. After a thorough discussion of the attorney-client privilege and crime-fraud exception, Judge Aldisert of the Third Circuit concluded that the district court overstepped its authority in considering excerpts from the *Cipollone* trial records, which were unavailable to the magistrate, pursuant to 28 U.S.C. § 636(b)(1)(A), which governs district court reconsideration of pretrial determinations made by magistrate judges. *Id.* at 93-98. See also Paul C. Gluckow, *Attorney-Client and Work Product Privileges - Crime-Fraud Exception - When Reviewing Magistrates Conclusions*, 23 SETON HALL L. REV. 800, 803-04 (1993) [hereinafter Gluckow].

315. *Haines*, 975 F.2d at 97-98. The Third Circuit focused at length on the following prologue from Judge Sarokin's opinion, when determining petitioners' right to an impartial judge:

In light of the current controversy surrounding breast implants, one wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity!

*As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.*

*Haines*, 140 F.R.D. at 683 (emphasis added). See generally Bennett L. Gershman, *Disqualifying Judges for Bias: The Sarokin Case*, 208 N.Y. L.J. 57 (1992) at 1.

316. *Haines*, 975 F.2d at 97.

317. *Cipollone v. Liggett Group, Inc.*, 799 F. Supp. 466 (D.N.J. 1992).



### E. *The Third Wave of Tobacco Litigation*

Despite the release of numerous internal tobacco industry documents for the first time in *Cipollone*, Philip Morris, Lorillard and Liggett managed throughout *Cipollone* and *Haines* to withhold approximately 1,500 special project documents, under cover of the attorney-client privilege and work product doctrine.<sup>318</sup> Another tobacco company, Brown & Williamson ("B&W"), has never been compelled to disclose any of its "similar[ly] sensitive" records in its own history of tobacco litigation.<sup>319</sup> Meanwhile, the contents of B&W's internal documents ("B&W documents"), including memoranda, reports, studies and correspondence allegedly relating to the effects of smoking on health are surfacing in the press,<sup>320</sup> in Congress,<sup>321</sup> and on the television networks,<sup>322</sup> despite this exposure, B&W continues to fight every discovery request served upon it.<sup>323</sup>

#### 1. *Brown and Williamson Documents*

These leaked B&W documents suggest that B&W, as well as the other tobacco companies, have known for decades about

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318. See *supra* parts IV.D.1-2.

319. Myron Levin, *Tobacco Firm Sought to Cull Studies as "Deadwood,"* L.A. TIMES, August 2, 1994, at A1, col. 5 [hereinafter Levin].

320. See, e.g., Andrew Wolfson, *Tobacco on Trial; Papers May Be Weapon in Smoker's Suits,* THE COURIER-JOURNAL, May 22, 1994, at A1 [hereinafter Wolfson]; Claudia MacLachlan, *Tobacco Lawyers Go On the Offense: Brown and Williamson Hires Big Guns as it Battles Congress, Media over Document Disclosures,* NAT'L L. J., May 30, 1994, at A6, col. 2 [hereinafter Claudia A]; Levin, *supra* note 319, at A1, col. 5.

321. HOUSE SUBCOMM. ON HEALTH AND ENV'T, NEWLY-RELEASED BROWN AND WILLIAMSON TOBACCO COMPANY DOCUMENTS, ORIGINALLY SUBMITTED TO THE WAXMAN SUBCOMMITTEE, DEMONSTRATE LONG-STANDING KNOWLEDGE OF NICOTINE ADDICTION AND EXPERIMENTAL INDUCTION OF LUNG CANCER (Press Release December 3, 1994) [hereinafter "Press Release"].

322. Transcripts, ABC'S DAY ONE, February 28, 1994 (Smoke-Screen, Part I), March 7, 1994 (Smoke-Screen, Part 2), and May 16, 1994 (where Brennan Dawson of the Tobacco Institute discussed the B&W documents). See also Transcripts, ABC'S FRONTLINE, January 3, 1995 (The Nicotine War); PANORAMA'S PACK OF LIES, *supra* note 233.

323. Of the fifty liability claims filed against B&W in the 1980s, the L.A. Times contacted plaintiffs' attorneys in forty-nine cases, whereby "no significant discovery" was obtained from B&W before the cases were dismissed or abandoned. Levin, *supra* note 319.

the health hazards of smoking.<sup>324</sup> These documents may be able to prove that the tobacco industry had knowledge<sup>325</sup> of the addictive nature of nicotine<sup>326</sup> and that they manipulated the levels of nicotine in cigarettes in order to create an addiction to that chemical among users.<sup>327</sup> Beginning in the 1960s, the industry tried various methods of concealing this damaging information,<sup>328</sup> including the handling by and channeling of this

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324. Claudia MacLachlan, *Tobacco Documents: Plaintiffs See Civil RICO in Nicotine Suit Papers Show Industry Lawyers May Have Abused Attorney-Client Privilege*, NAT'L L. J., May 23, 1994, at A1, col. 1 [hereinafter Claudia B].

325. See, e.g., Wolfson, *supra* note 320. Addison Yeaman's memorandum dated July 1963 acknowledged that "[B&W is] . . . in the business of selling nicotine, an addictive drug," and suggested that the company disclose the health hazards to the Surgeon General and engage in research to minimize them. An internal report dated 1972 by William L. Dunn, Jr., a senior scientist with Philip Morris indicated that "[t]he physiological effect [of smoking] serves as the primary incentive; . . . [t]hink of the cigarette pack as a storage container for [a] day's supply of nicotine . . . [t]hink of the cigarette as a dispenser for a dose unit of nicotine . . . [t]hink of a puff of smoke as the vehicle of nicotine . . ." Douglas, *supra* note 217, at 3 (quoting *Cippolone*, 649 F. Supp. 644, plaintiffs' exh. p-5171); A 1983 research report from Philip Morris revealed that nicotine was addictive in rats. Douglas, *supra* note 217, at 3.

326. See, e.g., TESTIMONY OF GLENN, *supra* note 224, at 115-16. Testimony of Dr. Glenn, Chairman of CTR before the Subcommittee on Health and the Environment indicated that nicotine is not addictive and there is no causal link between smoking and health illnesses. Testimony of Thomas Sandefur, Jr., Chairman and CEO of B&W indicated that he believed that nicotine is not addictive. Transcript, ABC WORLD NEWS TONIGHT, June 23, 1994 (Justice Department Reviews Tobacco Company Hearings); Minutes from a 1962 research conference in England, attended by B&W scientists, revealed that James Greene, a BAT research director suggested to "adopt the attitude that the causal link between smoking and lung cancer was proven, because then at least we could not be any worse off" while Anthony D. McCormick, a board member of BAT submitted that such acknowledgement would be "irresponsible." Levin, *supra* note 319, at 16.

327. See, e.g., Douglas, *supra* note 217. Advertisements in tobacco industry trade publications by LTR Industries, a subsidiary of Kimberly-Clark Corp., described a "reconstitution" process which "enables manufacturers to triple or even quadruple the nicotine content of reconstituted tobacco, thus substantially increasing the level of nicotine contained in the final manufactured product." Testimony by R.J. Reynolds attorney stated that 70% of the nicotine in the Premier cigarette consisted of separately added nicotine extract. *Id.* at 4. "Project Wheat" of 1975-76 included a B&W questionnaire which indicated smokers' preferences in cigarettes as a desire for low-tar and "high 'inner need' for [increased levels of] nicotine," and two years later B&W developed the "Barclay" cigarette to satisfy both desires. Philip J. Hilts, *Tobacco Company Chief Denies Nicotine Scheme in Testimony*, N.Y. TIMES, June 24, 1994, at A1.

328. Scientific research was discouraged. See, e.g., PACK OF LIES, *supra* note 233 at 7. A memorandum written by Vice President of Research and Development at Philip Morris listed the subjects to be avoided in the potential joint research

information to attorneys merely to activate the cloak of the attorney-client privilege, allowing the documents to remain concealed under the color of the privilege.<sup>329</sup>

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between Philip Morris and Lorillard tobacco companies, including the development of new carcinogen testing and the linkage of human disease to smoking. Claudia B, *supra* note 324, at A1. A November 9, 1979 Memorandum written by Brown & Williamson attorney J. Kendrick Wells III indicated that B&W had avoided further research on nitro-nornicotine, a potent carcinogen found in oral snuff, because "it is the other side's duty."

Scientific Laboratories were shut down. *See, e.g.*, PACK OF LIES, *supra* note 233, at 9. R.J. Reynolds' "mouse house" was shut down and all research was collected by the legal department.

Research studies and results vanished. *See, e.g.*, Memorandum dated January 17, 1985 by J. Kendrick Wells III, of Brown & Williamson describing the removal of "deadwood files," by identifying these "useless" documents with an "X" to separate and ship them potentially overseas. Levin, *supra* note 319 (part of these deadwood documents were the "Janus" studies: biological research which confirmed that tobacco smoke causes tumors in animals). *Id.*

Battelle Labs in Geneva, Switzerland was hired by BAT to "investigate whether or not nicotine acts on brain functions in a way similar to that of the tranquilizing drugs." Press Release, *supra* note 322. *See* Claudia MacLachlan, *Firm Helped Direct Tests on Tobacco*, NAT'L L. J., May 16, 1994, at A6 [hereinafter Claudia C]. A 1984 memorandum written by J. Kendrick Wells III states that "[d]irect lawyer involvement is needed in all [British American Tobacco] activities pertaining to smoking and health from conception through every step of the activity." *Id.*

329. Industry lawyers were involved with the research. *See, e.g.*, Memorandum dated November 9, 1979, authored by J. Kendrick Wells III, as General Counsel to B&W, which advised the company that "[i]n order to be covered by the rules of civil procedure [scientific reports] must be prepared in anticipation of litigation' . . . [and that B&W must] establish 'appropriate paperwork' with its British parent [BAT] so that documents 'of a certain nature are prepared for [B&W] in anticipation of litigation.'" Claudia C, *supra* note 328, at A1; Another 1979 memorandum written by Wells encouraged the company to route all research reports through the company's legal department. Levin, *supra* note 319. A 1986 memorandum written by Wells advising the company to utilize " . . . 'concise reports . . . [since] the brevity of the reports will reduce the potential for receipt by B&W of information useful to a plaintiff.'" Levin, *supra* note 319, at 17-18. A 1970 letter from David Hardy of Shook and Hardy to B&W advised that "in [the firm's] opinion the effect of testimony by employees or documentary evidence from the files of either [British American Tobacco] or [Brown and Williamson] which seem to acknowledge or tacitly admit that cigarettes cause cancer or other disease would likely be fatal to the defense of either or both companies in a smoking and health case." PACK OF LIES, *supra* note 233, at 9; The testimony of Dr. John Slade, a professor at the Robert Wood Johnson Medical School, recalls a lunch conversation with Dr. Frank Colby, a former R. J. Reynold's scientist, where Dr. Colby explained that a project dealing with the effect of cigarette smoke on mice was transferred from the Special Project Division of the CTR to the CTR itself when the results turned out favorably to the industry. *Id.*

## 2. *The Merrill Williams Litigation*

The name of Merrill Williams is repeatedly cited as the source of the B&W documents.<sup>330</sup> Merrill Williams, a former paralegal at the law firm of Wyatt, Tarrant & Combs ("Wyatt"), was assigned to work as a document analyst in B&W's ongoing tobacco product liability litigation between January of 1988 and July of 1993.<sup>331</sup> As a condition of his employment at Wyatt, Williams was required to sign a nondisclosure agreement<sup>332</sup> and a confidentiality form.<sup>333</sup> Included in paragraph three of the nondisclosure agreement is a statement indicating that an "employee, [upon termination], will not remove any confidential information, reproductions or personally-made records . . . and will immediately return any such records already removed."<sup>334</sup> Although Williams was hired and paid by Wyatt, he was physically located at the offices of B&W for three years.<sup>335</sup> Williams, a smoker of B&W's tobacco products "Kool" and "Richland" for

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Lawyers were involved with hiring and firing of scientists and funding their research. *See, e.g.*, Memoranda dated between February 1978 and April 1984 from Shook and Hardy to B&W, Lorillard and Philip Morris revealing lawyers involvement with the hiring of scientists and funding of their research projects. Claudia C, *supra* note 328, at A6, col. 4; The research results of Dr. Hornburger, which found that cancer of the larynx could successfully be induced in hamsters using a smoke inhalation device, were allowed to be published if the word "pseudoepithelia hyperplasia," the scientific term for cancer, was utilized instead of "cancer." PACK OF LIES, *supra* note 233, at 6-7; The scientist, Dr. Dontenwill, whose funding for a similar study was canceled as being "unproductive," was paid \$50,000 for his silence. *Id.* at 7. *But see* Dr. Frank Colby, a former R.J. Reynold's scientist and key player in the Special Project Division of the CTR who testified to "wearing two hats . . . in charge of R&D information . . . [and] responsive to the legal department." *Id.* at 25. *See also* One scientist requesting a grant of \$88,773 to complete her work on the environmental factors causing death, received approval from Shook and Hardy directly two months after her inquiry. TESTIMONY OF GLENN, *supra* note 224, at 120.

330. *See, e.g.*, Claudia B, *supra* note 324; Philip J. Hilts, *The Life of Hiding for a Tobacco Critic Bound to Silence*, N.Y. TIMES, August 8, 1994, at A11.

331. Williams v. Wyatt, No. 93 CI-04806, William's Petition for Relief at 4 (Ky. Ct. App. filed Aug. 8, 1994) [hereinafter Petition for Relief].

332. *Id.* at 2-3. *See also* Williams v. Wyatt, No. 93 CI-04806, Exhibit F at 1, 1-2 (Ky. Ct. App. filed Aug. 8, 1994) [hereinafter Non-disclosure Agreement].

333. Petition for Relief, *supra* note 331 at 7. Wyatt is unable to find the signed copy of the confidentiality agreement. *Id.*

334. Non-disclosure Agreement, *supra* note 332 at 3.

335. Petition for Relief, *supra* note 331 at 4. Williams worked in the historical archives at B&W doing document analysis. *Id.* at 45-46.

twenty-nine years stopped smoking "cold turkey"<sup>336</sup> after seeing documents relating to the health effects of the use of tobacco products which "frightened him greatly."<sup>337</sup> Williams copied a number of these documents and then, for reasons that remain unclear, was terminated on March 13, 1992.<sup>338</sup> Thereafter, he suffered a massive heart attack, allegedly as a result of his addiction to tobacco products as well as the stress suffered from exposure to the documents relating to the dangers associated with tobacco use, and underwent quadruple bypass surgery.<sup>339</sup>

In the Spring of 1993, Williams sought damages for personal injuries suffered as a result of the actions of both B&W and its law firm Wyatt in *Williams v. Wyatt*.<sup>340</sup> Upon his attorney's advice, Williams turned the copied documents over to that attorney in a sealed box. The documents were then delivered to Wyatt accompanied by a letter requesting money damages for Williams' personal injuries, which was immediately rejected.<sup>341</sup> Williams then prepared a narrative "affidavit in expectation of death" describing the contents of the copied documents, which his attorney delivered to Wyatt two months later, accompanied by a threat to unseal it unless Williams was compensated for his injuries.<sup>342</sup> Several days later, on September 29, 1993, Wyatt brought suit against Williams in *Williams v. Wyatt*<sup>343</sup> seeking to recover all copies of the narrative, all of the copied documents taken from B&W's offices, and a restraining order forbidding Williams from discussing either the documents or his former employment at Wyatt with anyone, including his own attorney.<sup>344</sup> This restraining order was immediately granted,<sup>345</sup> and upon its subsequent appeal, the court of appeals upheld it "except as it directs petitioner to turn over additional material

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336. *Williams v. Wyatt*, No. 93 CI-04806, Exhibit H at 10, (Ky. Ct. App. filed Aug. 8, 1994) [hereinafter Answer and Counterclaim].

337. *Id.* at 5.

338. *Id.* at 13-14.

339. *Id.* at 14. See also Petition for Relief, *supra* note 331, at 5.

340. Petition for Relief, *supra* note 331, at 5.

341. *Id.* at 5-6.

342. *Id.* at 6 n.3.

343. *Williams v. Wyatt*, No. 94CA-1903-OA (Ky. Ct. App. Nov. 8, 1994).

344. Answer and Counterclaim, *supra* note 336, at 6.

345. *Williams v. Wyatt*, No. 93 CI-04806, Exhibit D at 1-2 (Ky. Ct. App. filed Aug. 8, 1994) [hereinafter Original Restraining Order].

in his possession.”<sup>346</sup> Subsequently, B&W moved to intervene and has been “jointly pursuing its claims” against Williams with Wyatt.<sup>347</sup>

Williams moved to dissolve the restraining order and requested an *in camera* review of the documents in order to determine whether they fit within the crime-fraud exception to attorney-client privilege. On January 7, 1994, Judge Wine of the Jefferson County, Kentucky Circuit Court denied Williams’ motion, instead broadening the scope of the injunction by requiring Williams to turn over all copies of “the documents and the narrative” to Wyatt and B&W.<sup>348</sup> In making this determination, the court relied in part on the aforementioned nondisclosure and confidentiality agreements.<sup>349</sup> The court reasoned that insufficient evidence was shown to support a reasonable belief that an *in camera* review would yield the weight of evidence necessary to overcome the attorney-client privilege.<sup>350</sup> Without having examined the documents, the court noted that it is “safe to assume that this information was confidential” or else Williams would have been able to obtain it from some third party source.<sup>351</sup>

Subsequently, Williams received an investigative demand from the Antitrust Division of the United States Department of Justice (“DOJ”), which was conducting its own investigation of the tobacco industry regarding “alleged conspiracies in restraint of trade.”<sup>352</sup> This request to speak to the government, in conjunction with his inability to speak to his own attorneys regarding his pending personal injury claims, prompted Williams to petition the court to reconsider, modify, and clarify the temporary injunction.<sup>353</sup> Later, Williams also sought modification of the injunction with regard to materials already in the public domain in order to permit him access to meaningful assistance of

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346. Williams v. Wyatt, No. 93 CI-04806, Exhibit E at 2 (Ky. Ct. App. filed Aug. 8, 1994) [hereinafter Revised Order].

347. Petition for Relief, *supra* note 331, at 6.

348. Williams v. Wyatt, No. 93 CI-04806, Exhibit A at 5 (Ky. Ct. App. filed Aug. 8, 1994) [hereinafter Temporary Restraining Order].

349. See *supra* notes 331-32 and accompanying text, for reference to these agreements.

350. Temporary Restraining Order, *supra* note 348, at 6-8.

351. *Id.* at 4-5.

352. Petition for Relief, *supra* note 331, at 8.

353. *Id.* at 7.

counsel.<sup>354</sup> These motions were followed by DOJ's motion to intervene, petitioning the court for clarification of the injunction against Williams in order to allow the United States Attorney's Office to question Mr. Williams regarding these matters.<sup>355</sup>

On April 8, 1994, the Jefferson County Circuit Court denied all requests for modification of the original order by both Williams and DOJ, expressing fear that "the risk is too great that confidential and privileged information will be discussed."<sup>356</sup> Petitioner argues, in his petition for relief, that the trial court stated "to allow Merrill to pursue his claims . . . would enable him to 'profit' from his unauthorized copying of the documents, in violation of the attorney-client privilege."<sup>357</sup> The petitioner further argues that the court did not address the reasons for the applicability of the attorney-client privilege in this instance.<sup>358</sup>

On May 7, 1994, the New York Times released an article describing the contents of some of these documents.<sup>359</sup> In the succeeding weeks it became apparent that copies of some of these B&W documents had been made available to Congress, major newspapers and the television networks, yet neither counsel for Wyatt and B&W nor William's counsel had ever seen them, and Williams no longer had copies of the documents in his possession.<sup>360</sup>

After public accusations that Williams had leaked the documents,<sup>361</sup> B&W returned to court to request an order to compel

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354. *Id.* at 9-11. The modifications sought the ability to: (1) speak to his attorneys; (2) publicly discuss information already in the public domain; (3) postpone the question of confidentiality until a later date; (4) allow a response to the DOJ investigative demand; and (5) allow the petitioner's counsel to read the narrative that "he prepared for them." *Id.* (emphasis added). See also Answer and Counterclaim, *supra* note 336, para. 3.

355. Petition for Relief, *supra* note 331, at 11. DOJ's motion was filed on March 17, 1994. *Id.*

356. Williams v. Wyatt, No. 93 CI-04806, Exhibit C at 2 (Ky. Ct. App. filed Aug. 8, 1994) [hereinafter Brief Opinion and Order].

357. Petition for Relief, *supra* note 331, at 12.

358. *Id.*

359. Philip J. Hilts, *Tobacco Company was Silent on Hazards*, N.Y. TIMES, May 7, 1994, at 1.

360. Petition for Relief, *supra* note 331, at 13-14. John Ballentine, counsel for Wyatt; J.F. Demoisey, counsel for Merrill Williams. *Id.*

361. Greg Otolski, *B&W Reaffirms its Stance on Smoking Addiction*, THE COURIER-JOURNAL, May 8, 1994 (quoting Fitzgerald, on B&W's behalf that "[i]t is our belief that anybody who knowingly uses stolen information is contributing to an

the production and investigation of these now public documents, to depose some of the holders including seven major news organizations<sup>362</sup> and two members of Congress,<sup>363</sup> and to forbid Williams and his counsel from viewing these documents.<sup>364</sup> The order was granted, and subpoenas were issued to compel the Congressmen to submit to depositions and produce documents.<sup>365</sup> In an effort to quash the subpoenas, the Congressmen removed the matter to the District Court of the District of Columbia.<sup>366</sup>

In the district court in *Maddox v. Williams*,<sup>367</sup> Judge Green granted the defendants' motion to quash the subpoenas on June 6, 1994,<sup>368</sup> and further denied the plaintiff's motion for reconsideration.<sup>369</sup> The court held that even where a legislative committee acquires information illegally, the Speech & Debate Clause of the United States Constitution provides protection to the subsequent use of such documents in the course of a legitimate legislative investigation.<sup>370</sup> On August 15, 1995, this order was affirmed on appeal by the United States Court of Appeals for the District of Columbia.<sup>371</sup>

The district court determined that the documents could conceivably be viewed as "evidence supporting a 'whistle-

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illegal act . . . [i]t's disturbing that the media would allow itself to be an accomplice").

362. These holders include, but are not limited to: The (KY) Courier-Journal; The National Law Journal; Gannett's USA Today; The New York Times; The Washington Post; National Public Radio; and CBS News. Andrew Wolfson, *Judge Questions B&W Campaign Over Company Documents*, THE COURIER-JOURNAL, September 15, 1994, at 6B. See also Petition for Relief, *supra* note 331, at 3 n.2.

363. The Congressmen include: Representative Henry Waxman, the Chairman of the House Subcommittee on Health and the Environment and Representative Ron Wyden, a member of that subcommittee. *Maddox v. Williams*, 855 F. Supp. 406 (D.D.C. Cir. 1994).

364. *Williams v. Wyatt*, No. 93 CI-04806, Exhibit J at 4 (Ky. Ct. App. filed Aug. 8, 1994) [hereinafter Protective Order and Commission]. See also Petition for Relief, *supra* note 331, at 14-15.

365. Protective Order and Commission, *supra* note 364. 855 F. Supp. at 408. The Congressmen were ordered to appear at the offices of King & Spaulding, counsel for B&W. *Id.*

366. 855 F. Supp. at 408.

367. *Id.*

368. *Id.*

369. *Id.* at 417-18.

370. *Id.* at 411-13.

371. *Brown and Williamson v. Williams et al.*, No. 94-5171 (D.C. Cir. Aug. 15, 1995).



blower's' claim that the tobacco company concealed from its customers and the American public the truth regarding the health hazards of tobacco products . . . ."<sup>372</sup> The court further described B&W's strategy as one where "those seeking to bury their unlawful or potentially unlawful acts . . . could achieve that objective by . . . delay[ing] or confus[ing] any charges of health hazard, fraud, corruption, overcharge . . . by focusing instead on inconvenient documentary evidence and labeling it as the product of theft, violation of proprietary information, interference with contracts, and the like."<sup>373</sup> The court raised the inference that "if the documents at issue did not represent the proverbial 'smoking gun' evidencing the company's allegedly long-held and long-suppressed knowledge that its product[s] constitut[e] a serious health hazard," then why would B&W be spending so much time, energy and money to conceal them?<sup>374</sup> In conclusion, the court viewed the subpoenas as "the means by which the company is seeking to intimidate, and in a sense punish, both Dr. Williams, the discoverer of evidence . . . and the [Congressmen] who are seeking to investigate [the tobacco industry]."<sup>375</sup>

Another motion by Williams to dissolve the temporary injunction or modify its terms was denied; however, the judge admitted that although he may have "blindness" on in this matter, this kind of "the end justifies the means" sort of conduct could not be allowed to eviscerate the attorney-client privilege.<sup>376</sup> On August 8, 1994, Williams filed a petition for relief with the Kentucky Court of Appeals, moving that the trial court be prohibited from enforcing the temporary injunction of January 7, 1994 and from re-issuing any similar restraining order.<sup>377</sup> Williams asserted that the trial court erroneously made three unsubstantiated assumptions including the assumption that Williams had breached the attorney-client privilege with regard to the documents in question.<sup>378</sup> In opposing this assumption, Williams ar-

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372. *Maddox*, 855 F. Supp. at 415.

373. *Id.*

374. *Id.* at 415 n.31.

375. *Id.* at 415.

376. *Williams v. Wyatt*, No. 93 CI-04806, Exhibit P at 1-3 (Ky. Ct. App. filed Aug. 8, 1994) [hereinafter Trial Court Transcript].

377. Petition for Relief, *supra* note 331, at 1-2.

378. *Id.* at 19-23.

gued that nothing in the record supported the privilege claims other than an affidavit by J. Kendrick Wells,<sup>379</sup> then General Counsel for B&W, who claimed that all of the documents in question were "within the ambit of attorney-client privilege and the work product doctrine."<sup>380</sup> Williams refuted the applicability of the attorney-client privilege and work product doctrine to these B&W documents, because they appear to include "business advice" memoranda, as well as being subject to both a waiver of and the crime-fraud exception to the attorney-client privilege.<sup>381</sup>

Williams provided a thorough legal analysis of the applicability of the attorney-client privilege and work product doctrines in the State of Kentucky, and made a case for their inapplicability to these documents.<sup>382</sup> First, Williams asserted that the trial court erred by assuming that the documents were privileged absent the requisite proof.<sup>383</sup> Second, Williams asserted that the attorney-client privilege did not apply to these "smoking gun" documents due to the crime-fraud exception, made applicable by Wyatt and B&W's alleged "massive fraud on the American smoking public,"<sup>384</sup> as well as issues of both voluntary and involuntary waiver of the attorney-client privilege

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379. *Williams v. Wyatt*, No. 93 C1-04806, Exhibit G (Ky. Ct. App. filed Aug. 8, 1994) [hereinafter Affidavit of J. Kendrick Wells]. Mr. Wells stated "I recognize each of these documents as documents which were selected by or under the supervision of lawyers as being documents relevant to the pending and threatened litigation for analysis by Wyatt in furtherance of the defense of pending and threatened liability cases." *Id.* at 1-2. Furthermore, Mr. Wells asserted his personal knowledge that these documents have never been produced before in litigation, or made public in any other way. *Id.* See also Deposition of J. Kendrick Wells, No. 93-CI-04806, at 19, 23 (Ky. Ct. App. given Sept. 8, 1994). Testimony indicated that Wyatt, B&W's law firm, was involved in litigation work as well as business for B&W. *Id.*

380. Affidavit of J. Kendrick Wells, *supra* note 379, at 2.

381. Petition for Relief, *supra* note 331, at 22.

382. *Id.* at 23-54. See, e.g., *Futrell v. Shadon*, 828 S.W.2d 649 (Ky. 1992) (holding that "business discussions" with legal associates are not privileged communications); *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991) (holding that the attorney-client privilege does not apply to legal advice sought in furtherance of a crime). See also *Transit Authority of River City v. Vinson*, 703 S.W.2d 482 (Ky. Ct. App. 1985) (recognizing the qualified immunity offered by the work product doctrine is subject to limitation by a showing of substantial need and undue hardship).

383. Petition for Relief, *supra* note 331, at 21-22, 71.

384. *Id.* at 72-73. See also Affidavit of J. Kendrick Wells, *supra* note 379, at 15.

with respect to these documents.<sup>385</sup> Finally, Williams requested relief from the “gag order” which he claimed deprived him of his right to meaningful assistance of counsel.<sup>386</sup> Petitioner Williams claimed the trial court failed to determine any of these issues through the appropriate proceedings, instead relying on “assumptions,” giving lip-service to the privilege doctrines and their limitations.<sup>387</sup>

On November 8, 1994, Judge Schroder of the Kentucky Court of Appeals granted William’s petition for relief in part, directing a vacatur of the part of the temporary injunction which prevented Williams from communicating with his attorneys about the case.<sup>388</sup> The court reasoned that the trial court had failed to “adjudicate[ ] the application of the attorney-client privilege to the documents,” instead merely assuming that such privilege exists.<sup>389</sup>

Judge Wine of the circuit court, Wyatt and B&W appealed to the Kentucky Supreme Court from the court of appeals order and also filed a motion for a stay of that order pending final decision of the issue.<sup>390</sup> On November 22, 1994, the Kentucky Supreme Court granted appellant’s request for a stay of the order pending final decision on the merits of the appeal.<sup>391</sup> The court acknowledged that no judicial officer determined whether the attorney-client privilege applied to these documents, but found a “strong likelihood that some, if not many, are so privileged”<sup>392</sup> from the limited record on appeal.<sup>393</sup>

Appellants Wyatt, B&W and Wine requested that the court of appeals order be reversed, emphasizing the “sacrosanct” nature of the attorney-client privilege, that disclosure to appellee’s counsel must be forbidden, and that any such disclosure re-

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385. Petition for Relief, *supra* note 331, at 72.

386. *Id.* at 16, 71.

387. *Id.* at 19-23, 71.

388. Williams v. Wyatt, No. 93 CI-04806, App. B at 4 (Ky. Ct. App. filed Aug. 8, 1994) [hereinafter Denial to Modify].

389. *Id.* at 3-4.

390. Wyatt v. Merrill Williams, No. 94-SC-935-MR (Ky. Nov. 22, 1994) at 1 [hereinafter Supreme Court Order].

391. *Id.* at 4.

392. *Id.* at 3-4.

393. *Id.* at 3.

quires disqualification of appellee's counsel.<sup>394</sup> Furthermore, appellants argued that no authority existed to allow appellee the right to communicate this confidential information to his counsel, either in furtherance of his own defense or in prosecution of his claims.<sup>395</sup> Appellants Wyatt, B&W and Wine asserted that these documents were privileged in the first place, since Williams was a paralegal hired and trained "as part of the Brown & Williamson legal team . . . [e]verything he knows about Brown & Williamson is a product of the attorney-client relationship between Williams and Brown & Williamson."<sup>396</sup> Appellants further claimed that these documents "selected by [B&W's] counsel for detailed analysis by lawyers and paralegals,"<sup>397</sup> including Williams, were given subject to a confidentiality agreement,<sup>398</sup> and that to allow appellee to communicate to his counsel what he learns from those documents would essentially "invite opposing counsel" to participate in meetings where appellant's litigation strategy and application of the documents to pending litigation were discussed and analyzed.<sup>399</sup>

In opposition, Williams demanded that the order of the court of appeals be affirmed,<sup>400</sup> arguing that the existence of an issue involving the alleged applicability and abuse of the attorney-client privilege and the work product doctrine does not suspend the right to confer with one's own counsel or "obliterate the integrity of the adversarial process of litigation."<sup>401</sup> Williams argued that although Wyatt argued that the attorney-client privilege with respect to these documents is "sacrosanct,"<sup>402</sup> the trial court never made a ruling as to "what, if any, of the

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394. Brief of Appellants at 16-20, *Wyatt v. Merrill Williams*, No. 94-SC-935-MR (Ky. Nov. 22, 1994). See, e.g., *Hull v. Celanese Corp.*, 513 F.2d 568, 572 (2d Cir. 1975) (the court held that the disclosure of documents protected by the attorney-client privilege need not be proven, it may be presumed, requiring disqualification of counsel); *Riggs v. Schroering*, 822 S.W.2d 414 (Ky. 1992) (Response Brief of Appellants at 4, 7-8) (attorney-client privilege is "sacrosanct").

395. *Wyatt v. Merrill Williams*, No. 94-SC-935-MR (Ky. Nov. 22, 1994).

396. *Id.* at 7.

397. Brief of Appellants, *supra* note 394, at 3.

398. Nondisclosure Agreement, *supra* note 332.

399. Brief of Appellants, *supra* note 394, at 14.

400. *Merrill Williams Brief in Opposition* at 48, *Wyatt v. Merrill Williams*, No. 94-SC-935-MR (Ky. Nov. 22, 1994).

401. Reply Brief of Appellee, *Merrill Williams* at 2, *Wyatt v. Merrill Williams*, 94-SC-935-MR (Ky. Nov. 22, 1994).

402. See *supra* text accompanying note 394.

documents . . . *actually* do fall within the 'attorney-client privilege,'"<sup>403</sup> since the court based its decision solely upon the testimony of J. Kendrick Wells. Appellee also claimed that his inability to receive effective assistance of counsel prevented him from disputing any assertion of privilege, any claim against him, or from prosecuting his own personal injury claims.<sup>404</sup>

On February 16, 1995, the Kentucky Supreme Court reversed the order of the court of appeals purely on procedural grounds,<sup>405</sup> and therefore did not address the issue of attorney-client privilege.<sup>406</sup> Meanwhile, the complexion of this case has changed dramatically. In addition to Williams fleeing the State of Kentucky in order to avoid the gag order,<sup>407</sup> it readily became apparent that Stanton Glantz, a professor of medicine at the University of California at San Francisco and an active tobacco opponent, has been quietly housing a copy of the B&W documents since May of 1994 when he received them in an anonymous Federal Express shipment.<sup>408</sup> Glantz has made these documents available for public inspection in a special archive at the university's medical library.<sup>409</sup> Subsequently, B&W made fierce attempts to recover the documents in the possession of the university, and to seek injunctive relief to prevent public access to these documents.<sup>410</sup> These attempts were brought to a halt on May 25, 1995, by Judge Stuart A. Pollack who ruled that the documents may remain accessible to the public.<sup>411</sup>

Given the nationwide dissemination of the documents, on April 3, 1995, Judge Wine of the Kentucky Circuit Court found it necessary to modify the temporary injunction of January 7,

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403. Merrill Williams Brief in Opposition at 25 (emphasis in original).

404. *Id.* at 2-4, 7-10.

405. The Kentucky Supreme Court held that the court of appeals improperly exercised its jurisdiction in modifying an injunction, where Williams precluded himself from claiming no adequate remedy by appeal after failing to file appeal of the injunction within the statutory twenty day period. *Wyatt v. Williams*, 892 S.W. 2d 584, 586 (Ky. 1995).

406. *Id.*

407. Bill Kisluk, *Searching for Mr. Butts; Mystery Tobacco Papers Fuel Litigation*, LEGAL TIMES, May 29, 1995, at 2.

408. Michael Orey, *A Mole's Tale*, AM. LAW., July-Aug. 1995.

409. *Id.*

410. *Brown and Williamson v. Regents of the Univ. of Cal.*, No. 96-7298 (Cal. App. Dep't Super. Ct. May 25, 1995).

411. *Id.*

1994 to allow Williams to speak with his legal counsel.<sup>412</sup> In addition, the court rejected Williams' attorney's motion for Judge Wine to voluntarily remove himself from the case and assign the matter to another judge.<sup>413</sup> Instead, Judge Wine assigned himself to the job of reviewing the documents *in camera* to determine if they are privileged.<sup>414</sup> To date, the issue of privilege is still pending before the circuit court.

### 3. *Butler v. Philip Morris*

In *Butler v. Philip Morris, Inc.*,<sup>415</sup> the plaintiffs initially filed a motion to compel, requesting that the court overrule defendant B&W's objections and compel B&W to respond more completely to the plaintiffs' initial request for the production of between one hundred and six hundred B&W documents.<sup>416</sup> On or about August 17, 1994 B&W produced only four of the requested documents<sup>417</sup> and objected to the disclosure of every other requested document, claiming that the documents were stolen from Wyatt, the Kentucky law firm representing B&W, and were subject to the injunction issued by the Circuit Court of Jefferson County.<sup>418</sup> B&W further objected to the discovery request on the grounds that the documents were subject to the

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412. *Maddox v. Williams*, No. 93C104806, 1995 WL 569425 (Ky. Cir. Ct. Apr. 3, 1995).

413. *Id.*

414. *Id.*

415. No. 94-5-53, slip op. (Miss. filed Jan. 6, 1995). Defendants include: Philip Morris, Inc., Philip Morris Companies, Inc., Brown & Williamson Tobacco Corp., Batus, Inc., BAT Industries PLC, R.J. Reynolds Tobacco Co., RJR Nabisco, Inc., Liggett Group, Inc., Liggett & Myers, Inc., The Brooke Group, Limited, American Brands, Inc., The American Tobacco Co., Loews Corp., Lorillard Corp., The Council for Tobacco Research—U.S.A. Inc., Tobacco Institute Research Committee, The Tobacco Institute, Inc., Hill & Knowlton, Inc., and Laurel Cigar & Tobacco Co. *Id.*

416. *Id.* See also *supra* part IV.E.1.

417. Memorandum in Support of Plaintiff's Motion to Compel at 2, *Butler v. Philip Morris*, (Miss. filed Jan. 6) (No. 94-5-53) [hereinafter Plaintiff's Memorandum]. The four documents included: A report entitled *The Fate of Nicotine in the Body*, dated May, 1963, authored by E. Gessbuhler and C. Haselbach; *Final Report on Project HIPPO II*, dated January, 1962, authored by J. Hersch, O. Libert and C. Ross-Effront; *Report No. 1 Regarding Project HIPPO II*, dated June, 1962, authored by O. Libert of the Battelle Memorial Institute for British American Tobacco Company, Ltd.; and *Final Report on HIPPO II*, dated March, 1963, authored by C. H. Haselbach and O. Libert. *Id.*

418. *Id.* at 3-4. See also *supra* part IV.E.2.

attorney-client privilege and work product doctrine.<sup>419</sup> Finally, B&W objected to the production of the documents on grounds that the request was "overly broad, vague and burdensome."<sup>420</sup>

With regard to the injunction, plaintiff argued that the Kentucky Circuit Court cannot bind the Circuit Court for the Second Judicial District of Jones County, Mississippi, and the injunction was relevant only towards the law clerk who allegedly stole the documents, not to the plaintiffs in this case, who are third parties to that action.<sup>421</sup> Plaintiff additionally asserted that the injunction was issued without the court having examined the documents to determine the applicability of the attorney-client privilege.<sup>422</sup>

In his motion to compel,<sup>423</sup> the plaintiff offered three arguments refuting B&W's objection that the documents are privileged communications in accordance with the attorney-client privilege and work product doctrine. First, by failing to particularize which documents were allegedly privileged and the reasons for their confidentiality, B&W has improperly asserted the privilege, thereby waiving any future right to do so with regard to these documents, and since B&W disclosed allegedly privileged research studies, they had waived the privilege as it applies to all other allegedly privileged documents.<sup>424</sup> Second, that the requested documents were outside the scope of the type of information intended to be protected by the attorney-client privilege and work product doctrines, since they "passed through the hands of an attorney [simply] to create a 'privileged sanctuary' for corporate records," containing primarily business rather than legal advice and having been prepared for research purposes as opposed to litigation preparation.<sup>425</sup> The plaintiff alleged that the selection of these B&W documents was actually done by Merrill Williams himself, not a lawyer.<sup>426</sup> Further-

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419. Plaintiff's Memorandum, *supra* note 417, at 4.

420. *Id.* at 3.

421. *Id.* at 4.

422. *Id.* at 14.

423. Plaintiff's Motion to Compel, *Butler v. Phillip Morris* (Miss. filed Sept. 28, 1994) (No. 94-5-53) [hereinafter "Plaintiff's Motion to Compel"].

424. *Id.* at 4-6. The research studies consisted of four documents already released by Brown & Williamson. Transcript, ABC's DAY ONE, May 16, 1994.

425. Plaintiff's Motion to Compel, *supra* note 423, at 7.

426. Plaintiff's Memorandum, *supra* note 417, at 22.

more, plaintiff claimed that if the documents were legitimate attorney work product, their immunity was overcome by plaintiff's substantial need for the information and the inability to acquire this information by other means without undue hardship.<sup>427</sup> Finally, the plaintiff characterized these documents as materials "reasonably calculated to lead to evidence of fraud and conspiracy."<sup>428</sup> The communications involved the assistance of counsel only to further the company's fraud upon the court as well as their continuing fraud and deceit on the American public, and therefore fall into<sup>429</sup> the crime-fraud exception to any privilege that might otherwise apply, pursuant to the Mississippi Rules of Evidence.<sup>430</sup>

Finally, the plaintiff argued that the requested documents had been subject to wide public distribution, and discounted the defendant's last objection that the discovery requests were "overly broad and burdensome."<sup>431</sup> The plaintiff sought either the compulsion of B&W to produce the requested documents, or an *in camera* inspection by the court to assess the applicability of the crime-fraud exception to the attorney-client privilege, plaintiff having already provided a *prima facie* showing that ongoing fraud exists.<sup>432</sup>

On February 6, 1995, circuit court Judge William J. Landrum granted the plaintiff's request for *in camera* review of documents and will appoint a special master to determine the applicability of attorney-client privilege, work product doctrine and/or the crime-fraud exception to these privilege doctrines, if he finds that the plaintiff has made a showing sufficient to support a "good faith belief by a reasonable person that [such a] review of the documents may reveal evidence to establish the claim that the crime/fraud exception applies."<sup>433</sup> In furtherance of this, the court ordered B&W to turn over to the court the approximately six hundred documents within three days, along with a list cataloging each document, the reasons asserted for

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427. Plaintiff's Motion to Compel, *supra* note 423, at 7-8.

428. *Id.* at 8.

429. Plaintiff's Memorandum, *supra* note 417, at 24.

430. Miss. R. Evid. 502(d)(1).

431. Plaintiff's Motion to Compel, *supra* note 423, at 8-9.

432. Plaintiff's Memorandum, *supra* note 417, at 25-26.

433. *Order Granting Motion to Compel* at 3, *Butler v. Phillip Morris* (Miss. filed Feb. 6, 1995) (No. 94-5-53) [hereinafter "Order Granting Motion to Compel"].



its confidentiality, the identification of all persons mentioned in each, and an affidavit signed by counsel of record in *Butler v. Philip Morris* that the documents produced are the same complete set of documents as identified by J. Kendrick Wells on two prior occasions.<sup>434</sup>

To date, no determination has been made as to whether or not the B&W documents are privileged and thereby are protected from disclosure. However, disinterested attorneys who have reviewed most of the Brown & Williamson documents available through the media have rebutted the assertions of the attorney-client privilege with respect to this material.<sup>435</sup>

#### F. *The Current Status of the Tobacco Litigation*

In addition to the fraudulent activity uncovered in the B&W documents, the 1990s witnessed Congressman Marty Meehan's delivery of a "Prosecution Memorandum" to Attorney General Janet Reno on December 14, 1994 against Brown & Williamson, its parent company British American Tobacco Company and its lawyers.<sup>436</sup> The Prosecution Memorandum outlined criminal allegations including perjury, false advertising, deception of federal agencies, deception of the public, conspiracy and Racketeer Influenced and Corrupt Organizations ("RICO") Law violations.<sup>437</sup> As a result of these inquiries, the United States Attorney's Office in New York and the Justice Department's criminal division in Washington have been reviewing industry documents and Congressional testimony and recently convened a grand jury in New York to examine the

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434. *Id.* at 2-3. See also Affidavit of J. Kendrick Wells, *supra* note 379; Deposition of J. Kendrick Wells (Sept. 8, 1994).

435. Geoffrey Hazard, Jr., an ethics expert at Yale Law School, claims that "there is no possible reason for a law firm [of Shook, Hardy & Bacon] to be doing this except to gain the protection of the [attorney-client] privilege," intending to shield damaging research results from the public. Claudia B, *supra* note 324, at A1. Mathew L. Myers, a partner at a Washington D.C. firm, Asbill, Junkin & Myers and counsel to the Coalition on Smoking or Health, affirmed Hazard's statement claiming the "documents 'blow the lid off' any argument for attorney-client privilege." *Id.*

436. Mark Gottlieb, *Tobacco Industry Target of Prosecution Memo Submitted to Justice Department*, TOBACCO ON TRIAL, Nov./Dec. 1994, at 13-14.

437. *Id.*

prospect of criminal charges against the tobacco executives.<sup>438</sup> Meanwhile, the Food and Drug Administration and President Clinton are proposing new regulation of tobacco, including the classification of nicotine as a drug and banning all cigarette vending machines, in an attempt to restrict children's access to tobacco.<sup>439</sup>

All of this comes against the backdrop of an escalating barrage of pending smoker-liability lawsuits wherein the defendant tobacco companies continue to "wage a war of attrition" in their fight against disclosure.<sup>440</sup> In the pending case of *Dunn v. R.J. Reynolds Nabisco*,<sup>441</sup> the defendant Lorillard refused to respond to the plaintiff's discovery requests until a sweeping protective order was obtained.<sup>442</sup> *R.J. Reynolds v. Wendell Gauthier*<sup>443</sup> involves a complaint, filed by defendant RJR in North Carolina, over the discovery attempted by the plaintiff while the class-certified dispute was brought in Louisiana.<sup>444</sup> Plaintiffs are seeking new litigation strategies by pooling their efforts in class action suits<sup>445</sup> and employing innovative causes

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438. Philip J. Hilts, *U.S. Convenes Grand Jury to Look at Tobacco Industry*, N.Y. TIMES, July 26, 1995, at A1, A15.

439. *Id.* at A15. See also Steve Weinberg, *Hardball Discovery*, A.B.A. J., Nov. 1995, at 67.

440. See Castano Appendix A, *supra* note 48, at 9.

441. No. 18 DO1-9305-CT-06 (D.C. Ind. Jan. 17, 1995) (order granting motion for protective order).

442. *Id.*

443. No. 6:94 CV 00464 (D.C. N.C. 1995).

444. *Id.*

445. See, e.g., *Castano v. The American Tobacco Co.*, No. 94-1044, 1995 U.S. Dist. Lexis 2005 (E.D. La. Feb. 17, 1995). John P. Coale of Washington D.C.'s Coale, Allen & Van Susteren, has put together a "well-known and well-financed" group of lawyers who filed this suit in New Orleans, charging the tobacco companies with "knowingly addicting people to nicotine." Claudia B, *supra* note 324, at A1. The suit, known as Castano after Diane Castano, the widow of a smoker, was filed on behalf of the estimated fifty million allegedly "nicotine-dependent" smokers in America in order to seek punitive and compensatory damages. Castano at \*15. In February, a United States District Judge in New Orleans certified the class action against sixteen tobacco companies, recognizing that this will "be a daunting task with long, difficult days ahead." *Id.* at \*56. The following month, on March 8, 1995, the tobacco companies appealed the class action certification. Glenn Collins, *Tobacco Sees Way to Block a Big Lawsuit By Consumers*, N.Y. TIMES, Mar. 20, 1995, at D1, D4. The United States Court of Appeals reversed and remanded with instructions. 84 F.3d 734 (5th Cir. 1996).

of action, such as state-sought reimbursements for Medicaid costs expended on smoking related illnesses.<sup>446</sup>

### V. Analysis

In their effort to enforce the discovery rules and further the pursuit of truth, courts have narrowed the mechanisms available to corporate defendants seeking to avoid discovery.<sup>447</sup> As a result, corporate defendants have chosen the privilege doctrines, so fundamental to the proper functioning of the adversarial system, as their favored method of discovery avoidance, because these rules have not yet been sufficiently refined to prevent their use as a roadblock to discovery.<sup>448</sup> Indeed, the privilege doctrines are so basic to the effective operation of the adversarial system that they can never be adequately tailored to avoid abuse by a corporate defendant sufficiently motivated to impede discovery.

The tobacco companies have sufficiently utilized the attorney-client privilege and the work product doctrine as tactics to avoid exposing potentially damaging information to litigation.<sup>449</sup> Despite the release by Lorillard, Liggett and Phillip Morris of thousands of pages of internal documents related to the health effects of smoking in *Cipollone v. Liggett*<sup>450</sup> and *Haines v. Liggett Group, Inc.*,<sup>451</sup> thousands more remain concealed under color of the attorney-client privilege and the work product doctrine.<sup>452</sup> While Brown & Williamson has never been compelled to disclose any documents in litigation, it is currently

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446. Suits are commenced by a number of states, including Florida, Mississippi, Minnesota, Texas, and West Virginia, against tobacco companies in an effort to recover Medicaid costs spent on smoking-related illnesses. See, e.g., *Associated Indus. of Fla., Inc. v. State of Fla.*, No. 94-3128 (Fla. Cir. Ct. filed June 30, 1995). See also *Allman v. Philip Morris*, 865 F. Supp. 665 (D.C. S.D. Cal. filed Sept. 22, 1994) (where the industry faces a federal racketeering suit in San Diego, under the Racketeer Influenced and Corruption Organization Act, seeking \$9 billion in damages over nicotine).

447. See *supra* part II.

448. See *supra* part IV.D-E.

449. See, e.g., *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992); *Butler v. Philip Morris*, No. 94-5-53 (Miss. filed Jan. 6, 1995); *Maddox v. Williams*, No. 94-0171 (D.D.C. filed June 6, 1994); *Cipollone v. Liggett*, 683 F. Supp. 1478 (D.N.J. 1988).

450. See *supra* part IV.D.1.

451. See *supra* part IV.D.2.

452. See *supra* part IV.D.1-2.

asserting these privileges to protect hundreds of documents sought by the plaintiffs in two pending cases, *Williams v. Wyatt*<sup>453</sup> and *Butler v. Philip Morris, Inc.*<sup>454</sup>

While the rules of discovery and the ethical canons seek to protect confidential communications between a client and his counsel and counsel's work product from disclosure, the presumption in favor of finding that the privilege exists is not absolute.<sup>455</sup> There is a burden on a party asserting the privileges to establish that the privilege applies to the communication for which protection is sought, and why the privilege is required for each of the communications.<sup>456</sup> Yet, even though the tobacco companies have failed to make this requisite showing in *Cipollone*, *Haines*, *Wyatt* or *Butler*, their boilerplate assertions that the privileges apply to a sweeping array of materials have been routinely accepted by trial and appellate courts throughout the modern history of tobacco litigation. However, an improperly asserted claim of privilege results in a waiver of the privilege.<sup>457</sup>

In *Haines*, a very general privilege log, which failed to describe the documents or provide the precise reasons for their protection, was submitted by the defendants.<sup>458</sup> In both *Wyatt* and *Butler*, B&W failed to even submit such a log, and the court relied wholly on the existence of an affidavit by then General Counsel of B&W, J. Kendrick Wells, stating that he personally recognized each document to be selected under attorney supervision relevant to pending litigation, as well as the unproven existence of a signed confidentiality agreement between Merrill Williams, a paralegal who was the source of these copied documents, and B&W's law firm, Wyatt on which to base his decision that the documents were privileged.<sup>459</sup> A later deposition confirmed that Wells personally recalled looking at each of the documents in question individually, but he refused to answer why any specific document should be protected.<sup>460</sup> It seems ex-

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453. See *supra* part IV.E.2.

454. See *supra* part IV.E.3.

455. For a general discussion of the exceptions to the privilege doctrines see *supra* part III.E.

456. See *supra* text accompanying note 95.

457. See *supra* text accompanying notes 159-60.

458. See *supra* note 296.

459. See *supra* note 379 and accompanying text.

460. See *supra* note 379 and accompanying text.

traordinary that one man could recall hundreds of documents in detail, specifically, that they were channeled through lawyers over decades, yet could not recall why any one was individually deserving of protection. In terms of the confidentiality agreement allegedly signed at the start of William's employment, Wyatt cannot find the signed copy, and Williams has not testified to signing it, although the court has accepted Wells' word of its existence as fact.<sup>461</sup>

### A. *Application of the Attorney-Client Privilege*

For the attorney-client privilege to apply, certain technical requirements must be met: the corporation must be a "client"; the lawyer must be engaged in the relationship for the purpose of rendering legal advice or service; and the information in dispute must be communicated in confidence for the purpose of obtaining legal services.<sup>462</sup> If these requirements are met and the privilege is found to apply, it must then be determined whether the client has taken any actions which can be construed as constituting a waiver of the privilege.<sup>463</sup>

#### 1. *Rendering Legal Advice*

Despite the policy that the scope of the attorney-client privilege should be strictly construed so as not to interfere with legitimate discovery efforts, the courts' broad interpretation of *Upjohn*<sup>464</sup> has encouraged corporations to engage attorneys in every facet of corporate communication that could possibly be classified as legal, and in many that clearly cannot, in an effort to comply with the "legal advice" requirement of the attorney-client privilege. The tobacco companies have been no exception.<sup>465</sup>

There is abundant evidence establishing the use of tobacco industry lawyers in the hiring and firing of employees and in the selection of research projects for industry scientists to pur-

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461. See *supra* note 333 and accompanying text.

462. See *supra* text accompanying note 95.

463. See *supra* part III.D.

464. *Upjohn v. United States*, 449 U.S. 383 (1981). See, e.g., *Sexton*, *supra* note 126.

465. See *supra* part III.C.

sue.<sup>466</sup> The CTR, which was supposed to be a research group affiliated with and financed by the tobacco industry, was thick with lawyers making decisions on every facet of their operations and handling every document and communication in an attempt to immunize them from later discovery or disclosure.<sup>467</sup> As one Brown & Williamson attorney explained "if it goes wrong, [the findings of the CTR] can be the smoking pistol in a lawsuit," because all CTR data was considered to have become privileged merely by its having been channeled through a lawyer.<sup>468</sup>

Research was channeled into the Special Project Division of the CTR after undergoing a sterilization step of handling by industry attorneys so that the damaging results could be kept from the public under the color of the attorney-client privilege.<sup>469</sup> J. Kendrick Wells, as General Counsel, advised Brown & Williamson on how to immunize their research from public disclosure: "In order to be covered by the rules of civil procedure [scientific reports] must be prepared in anticipation of litigation[,]" so Brown & Williamson must "establish 'appropriate paperwork' with its British parent [BAT] so that documents 'of a certain nature are prepared for [Brown & Williamson] in anticipation of litigation[;]'"<sup>470</sup> a 1979 memorandum written by Wells encouraged the company to route all research projects through the company's legal department;<sup>471</sup> in a 1984 memorandum, Wells stated that "[d]irect lawyer involvement is needed in all [British American Tobacco] activities pertaining to smoking and health, from conception through every step of the activity[;]"<sup>472</sup> in a 1986 memorandum, Wells encourages the utilization of "concise reports . . . [since] the brevity of the reports will reduce the potential for receipt by [Brown & Williamson] of information useful to a plaintiff."<sup>473</sup>

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466. See *supra* note 329 and accompanying text.

467. See *supra* note 329 and accompanying text.

468. See *supra* note 241.

469. See *supra* note 329 and accompanying text.

470. See *supra* note 329.

471. See *supra* note 329.

472. See *supra* note 328.

473. See *supra* note 329.

Memoranda further show that counsel was present at all company meetings related to scientific research.<sup>474</sup> In-house and outside counsel were directly involved as decisionmakers in the hiring of scientists and the selection of research projects for tobacco industry funding.<sup>475</sup> Shook & Hardy,<sup>476</sup> outside counsel to Brown & Williamson, Lorillard and Philip Morris, in memoranda to in-house counsel at Brown & Williamson dated between February 1978 and April 1984, revealed the attorneys' involvement in the hiring of scientists specifically to work on special research projects.<sup>477</sup> Lawyers became the de facto decisionmakers in funding scientific research, exemplified in a series of letters from scientists to industry lawyers seeking approval of research grants. One scientist, requesting a grant of \$88,773 to complete her work on the environmental factors causing death, received approval from the lawyers at Shook & Hardy two months later.<sup>478</sup> A former RJR scientist and key player in the Special Project Division described the nature of his position as "wearing two hats," one as a person in charge of research and development information and the other as answerable to the legal department.<sup>479</sup>

After reviewing the "special project documents" in *Haines*, the special master observed that the CTR retained its own legal department and he therefore thought there was sufficient attorney-client communication to find that the privilege existed.<sup>480</sup> However, the mere funneling of information, specifically damaging scientific research, through attorneys clearly constitutes insufficient attorney input to establish attorney-client privilege

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474. See *supra* note 328 and accompanying text.

475. See *supra* note 329.

476. Shook, Hardy & Bacon, a two-hundred lawyer firm in Kansas City, has become "synonymous with tobacco for more than three decades" representing Philip Morris, Brown and Williamson Tobacco Corporation, Lorillard Inc., and advising the Council for Tobacco Research. John Schwartz & Saundra Torrey, *In Practice of Corporate Defense, Kansas City Firm Has Privileged Position*, WASH. POST, Sept. 26, 1995, at A8. In addition, the firm's clients have included the gunmaker Colt Industries, A.H. Robins Co., and leading drug companies whose products range from the Dalkon Shield, the anti-miscarriage drug DES, and the sleep drug Halcion. *Id.*

477. See *supra* note 329.

478. See *supra* note 329.

479. See *supra* note 329.

480. See *supra* note 300.

with respect to the work.<sup>481</sup> The purpose of the lawyers' involvement must be the rendering of legal services, not business advice in order to activate the privilege.<sup>482</sup> Testimony of an in-house attorney at B&W acknowledged that Wyatt, B&W's senior law firm, had done business counseling for B&W as well as litigation work.<sup>483</sup>

In order for the privilege to attach, the advice must be predominantly legal.<sup>484</sup> Memoranda between scientists and lawyers regarding the approval or disapproval of scientific research grants reveals that lawyers took an active administrative role in allocating research funds, based on the degree of public relations value potential in the project. Additionally, one letter from Shook & Hardy reveals the firm's involvement in reviewing research results before allowing them to be published.<sup>485</sup> As a result, scientists and their projects became primarily accountable to lawyers. These types of communications are clearly nonprivileged business records, and the mere handling of the documents by lawyers cannot elevate them to the status of attorney work product or protect them under attorney-client privilege.<sup>486</sup> Where the lawyer's involvement in the attorney-client relationship takes on the form of business advice, the rationale behind the attorney-client privilege ceases to function, and the privilege cannot apply.

## 2. Confidential Conveyance

The information for which protection is sought must be conveyed from the client to the attorney, in confidence, for the purpose of obtaining legal advice or services.<sup>487</sup> Although the "H&K documents,"<sup>488</sup> the "special project documents"<sup>489</sup> and the "[Brown & Williamson] documents"<sup>490</sup> are all allegedly confidential, confidential communications are limited to the tobacco

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481. See *supra* text accompanying note 115.

482. See *supra* part III.C.2.

483. See *supra* note 379.

484. See *supra* part III.C.2.

485. See *supra* note 329.

486. See *supra* text accompanying note 115.

487. See *supra* text accompanying note 95.

488. See *supra* text accompanying note 236.

489. See *supra* text accompanying note 289.

490. See *supra* part IV.E.1.



company or employee thereof as the client, not to third parties such as independently employed scientists.<sup>491</sup> Furthermore, memoranda regarding a CTR meeting where American Tobacco asserts the need for the CTR to become more politically oriented, hire more "skeptical scientists" and increase its role as an "industry shield" are clearly not within the scope of an attorney-client communication for purposes of the privilege, and therefore fall outside the scope of the attorney-client privilege.<sup>492</sup>

Certainly, information analyzed by a paralegal employed by Wyatt for the purpose of rendering legal advice on pending tobacco products liability litigation (information which was confidentially conveyed) is entitled to protection under the privilege. However, the special project documents which were channeled into the Special Project Division of the CTR by industry attorneys to intentionally hide damaging results from the public and memoranda between scientists and industry lawyers regarding business decisions on funding research and hiring should not be subject to the attorney-client privilege.

#### B. *The Assertion of the Work Product Doctrine*

The work product doctrine affords another type of protection for materials generated by an attorney in anticipation of litigation, creating a "zone of privacy"<sup>493</sup> within which an attorney may practice his craft free from the prying eyes of any person, whether party to a dispute or not.<sup>494</sup> The doctrine provides a two-tiered system of work product protection, one designed to protect "ordinary work product," the other designed to protect opinion, analysis and the mental impressions of the attorney.<sup>495</sup>

In order for the work product doctrine to apply to an item it must be prepared in anticipation of some litigation, that is, the item must be forged by the attorney in the practice of her craft, and the item must be prepared by a party, by a party's representative, or prepared for the use of that party.<sup>496</sup> The tobacco

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491. See *supra* part III.A.2, c.1 for discussion of the scope of the privilege.

492. See *supra* note 308.

493. See *supra* note 100 and accompanying text.

494. See *supra* part III.B.

495. See *supra* text accompanying note 105-06.

496. See *supra* note 101-03 and accompanying text.

companies have attempted a shotgun application of the work product doctrine to all of their research, marketing and public relations efforts in an attempt to force any potential litigants to exhaust their resources in any attempt to force a tobacco company to defend itself in any litigation.

### 1. *The Brown and Williamson Documents*

The Brown & Williamson documents were among a huge mass of correspondence generated by, between and amongst the tobacco companies, their subsidiaries, and their affiliated organizations.<sup>497</sup> These documents would normally be discoverable as historical archives; typically, such documents kept in the ordinary course of business are considered to be discoverable.<sup>498</sup> The mere collation, organization and archiving of documents will not protect them as attorney work product.<sup>499</sup> An attorney is not able to elevate the status of business records to documents protected by the work product doctrine by the strategy of "laying on of hands," that is, funneling a document through the hands of an attorney solely for purposes of granting them privileged status.

J. Kendrick Wells, one time General Counsel for Brown & Williamson, outlines just such a "laying on of hands" strategy in a memorandum to another Brown & Williamson attorney: "[I]n order to be covered by the [work product doctrine] [scientific reports] must be prepared in anticipation of litigation."<sup>500</sup> Wells further advised Brown & Williamson to characterize otherwise routine paperwork as such, as well as keeping all reports as brief as possible to reduce the potential of transferring presumably damaging information to an opponent in any potential litigation.<sup>501</sup> This memorandum, when considered in light of the foregoing advice, gives rise to the clear presumption that Brown & Williamson counsel sought to protect generally nonprivileged information by cloaking every piece of internal communication, every research and development study, every business record and every piece of information pointing to the devastating ef-

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497. See *supra* part IV.E.1.

498. See *supra* part IV.E.1.

499. See *supra* text accompanying note 115.

500. See *supra* note 329.

501. See *supra* note 329.

fects of tobacco use on human health within the ambit of the work product doctrine by having an attorney "bless" each document sometime in its life cycle, thereby claiming that the document was prepared in anticipation of litigation.

Wells himself, in sworn testimony, seemingly implies that this whole scheme is fraudulent: he intimates that many of the documents sought to be protected under the privilege existed prior to any pending litigation, indeed, they existed prior to any threats of litigation.<sup>502</sup> Although litigation need not be imminent for a document to be prepared "in anticipation of litigation," there must at least be some highly probable threat of litigation of which the lawyer is aware, rather than strictly scientific or non-directed legal research. Clearly, by Wells' own admission, at least some of these documents could not have been "prepared in anticipation of litigation" as is required to activate protection.

Finally, the mere fact that a document is prepared under the supervision of an attorney does not raise it to the level of opinion work product.<sup>503</sup> Although the courts have recognized the application of the work product doctrine to non-lawyers such as Williams working for and under the direct supervision of any attorney,<sup>504</sup> the document at issue must actually contain the opinions, conclusions, analysis or mental processes of a lawyer or quasi-lawyer, generated by or for the use of counsel, not merely the work product of some non-legal clerk or contractor, prepared for reason other than for use by the lawyer in the practice of her craft.<sup>505</sup>

The quest for truth and the "right to every man's evidence" are among the paramount goals of the American judicial system.<sup>506</sup> As all privileges must be narrowly construed when considered in light of the stated purpose of the privilege, the work product doctrine must not be applied in such broad strokes primarily for the purpose of concealing the truth.

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502. *See supra* notes 379-80.

503. *See supra* part III.B.

504. *See supra* note 103.

505. *See supra* notes 102-04.

506. *See supra* text accompanying note 173.

### C. *Application of the Exceptions to the Privileges*

Assuming *arguendo* that some of the “special project documents” withheld by the industry in *Cipollone* and *Haines*, as well as the Brown and Williamson documents withheld in *Wyatt* and *Butler*, are privileged and can be established as such, the burden of showing that an exception to the work product doctrine exists falls upon the party seeking discovery - the plaintiff in all of the aforementioned cases.<sup>507</sup> Work product protection can be overcome by a showing of substantial need for the otherwise privileged information or undue hardship with respect to obtaining the information in some other manner or from some other source.<sup>508</sup> The work product doctrine may also be overcome by a showing that the crime-fraud exception to the privilege applies.<sup>509</sup>

#### 1. *Availability of the Information by Other Sources*

In the tobacco litigation, the evidence of all of the plaintiffs’ claims are contained in documents generated by, and in the sole control of, the defendant tobacco companies.<sup>510</sup> There is no other forum to which the plaintiffs can turn in order to obtain the evidence necessary to prove their claims. Even the materials in the published press are worthless to these plaintiffs, since they are inadmissible as hearsay. The plaintiffs in *Butler* have presented this very argument as proof of a substantial need for the “privileged” materials, as well as the “undue hardship” necessary to justify the discoverability of ordinary work product.

#### 2. *The Confidentiality of the Communications Themselves*

The confidentiality of the client’s communication is the central focus of the work product doctrine.<sup>511</sup> In order to be covered under the ordinary work product doctrine, the client’s communications with her attorney must be made in confidence, with an expectation that the communication will remain confiden-

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507. See *supra* text accompanying notes 193-97.

508. See *supra* text accompanying note 112.

509. See *supra* part III.E.3.

510. See *supra* part IV.

511. See *supra* text accompanying note 153.

tial.<sup>512</sup> This principle of confidentiality is so central to the application of the privilege that courts have held that disclosure outside of the attorney-client relationship, regardless of the purpose, nature or mechanism of that disclosure, will act to moot the issue of confidence, thereby dissolving the privilege.<sup>513</sup> Moreover, disclosure of any material portions of a confidential communication will waive the privilege with respect to the entire communication.<sup>514</sup> Similarly, the disclosure of the contents of the communications to nonlegal and nonquasi-legal personnel, whether intentionally or not, will act to waive the privilege.<sup>515</sup>

The contents of the Brown & Williamson documents have been widely distributed outside of the scope of any relationship necessary to maintain ordinary work product immunity. The fact that at least some of the documents have been made public as a result of theft should not matter in considering the issue of waiver.<sup>516</sup>

### 3. *The Corporate Context*

Courts have narrowed the application of the privilege in the corporate context to employees directly involved in the privileged communication, or those who handle privileged data on a strictly "need to know" basis.<sup>517</sup> Wells testified in *Wyatt and Butler* that he had personal knowledge that the B&W documents were privileged and had never been produced outside of B&W.<sup>518</sup> The plaintiff in *Butler* contends that the disclosure of four of the allegedly privileged documents, part of a larger collection of documents, constitutes adequate disclosure to waive the privilege with respect to the rest of the set.<sup>519</sup>

Many nonlegal third parties were privy to these allegedly privileged documents who cannot satisfy the "need to know" criterion required to preserve the applicability of the privilege to the communication. Research and development employees,

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512. See *supra* part III.B.

513. See *supra* notes 165-69.

514. See *supra* note 157.

515. See *supra* text accompanying notes 158-59.

516. See *supra* text accompanying notes 153-57.

517. See *supra* text accompanying note 170.

518. See *supra* note 384.

519. See *supra* text accompanying note 429.

scientists, those employed by either the tobacco companies or independent contractors, the CTR, as well as employees of the public relations firm Hill & Knowlton were all privy to much of the allegedly privileged data.<sup>520</sup> Wigmore has defined the level to which this disclosure must rise to constitute a waiver of the privilege: Any disclosure to a third party which increases the likelihood "that an adversary will obtain the privileged information" will act to waive the privilege.<sup>521</sup> Certainly, it stretches credulity to believe that all of these organizations and the people employed by them satisfy the narrow "need to know" basis requirement. Thus, the widespread use of these documents by the tobacco companies in the context of their relationship with all of these parties surely constitutes disclosure sufficient to waive the privilege.

#### 4. *How Inviolate is the Privilege?*

Courts have long held that the privilege is not absolute, but only broad enough to achieve the purpose of confidentiality within the context of the rendering of legal advice.<sup>522</sup> Once the presumption of privilege is established, it may be overcome by a showing that there is some factual basis on which to support a reasonable belief that a strong public interest justifies the disclosure: an "intermediate" level of proof.<sup>523</sup>

The canons of ethics and the rules of evidence prohibit the destruction or alteration of evidence and discourage the giving of false evidence. The discovery rules oblige an attorney to continually supplement responses to discovery requests as additional pertinent knowledge becomes available in order to prevent the knowing concealment of such data.<sup>524</sup> Information so concealed is no longer privileged, nor usable at trial by the party effectuating the concealment.<sup>525</sup>

There is abundant evidence to give strong support to the inference that the tobacco companies and their attorneys took part in the destruction, alteration and falsification of evidence.

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520. See *supra* text accompanying notes 240-44 and part IV.E.1.

521. See *supra* text accompanying note 168.

522. See *supra* text accompanying note 172 and generally part III.C.2.

523. See *supra* text accompanying note 196.

524. See *supra* text accompanying note 31.

525. See *supra* note 26 and accompanying text.

Given the evidence in both the B&W documents and the special projects documents, it is apparent that the tobacco industry had voluminous evidence of the health risks associated with the use of tobacco products and the addictive nature of the nicotine added to their tobacco products, yet the companies and their lawyers not only deny that they possess this knowledge but seek to conceal this information through means that are clearly disingenuous, if not outrightly fraudulent.<sup>526</sup>

J. Kendrick Wells himself was involved in the formation of a document retention policy mandating that all documents associated with any scientific studies be marked as requiring special handling, collected for isolation, and evaluated for possible shipment to some foreign subsidiary of B&W or its parent company BAT, far from the prying eyes of those seeking to examine them.<sup>527</sup> The following actions point directly and unequivocally to an abuse of the attorney-client relationship and actions sufficient to invoke the crime-fraud exception, both of which are fatal to the doctrine of privilege: the removal of this "deadwood," particularly the Janus studies<sup>528</sup> to determine the carcinogenic nature of cigarette use; the termination of scientific projects that generated results damaging to the industry's public position; the disappearance of research results. Although it must be acknowledged that the mere knowledge by an attorney of her client's misconduct is insufficient by itself to force the attorney to withdraw from the representation or reveal the client's misconduct, an attorney is never permitted to assist the client in furtherance of such conduct. In the case of the tobacco industry, however, it appears that industry lawyers were partners, along with their corporate clients, in this giant cover up.

### 5. *Applicability of the Crime-Fraud Exception*

The crime-fraud exception to the work product doctrine and attorney-client privilege applies when the communication sought to be protected is made in furtherance of a future or ongoing crime or fraud.<sup>529</sup> A party seeking to overcome the privilege need only make a prima facie showing of a close relation-

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526. See *supra* notes 329-34 and accompanying text.

527. See *supra* note 333.

528. See *supra* note 333.

529. See *supra* text accompanying note 188.

ship between the protected communication and the alleged fraud.<sup>530</sup> No actual proof of a crime or fraud in fact need be presented, nor must there be a showing that the attorney is aware of the crime or fraud he is accused of assisting.<sup>531</sup> Courts have even permitted the use of the allegedly privileged documents themselves to provide the necessary showing that the exception should operate.<sup>532</sup>

Judge Sarokin, one of the few people to have objectively examined the Brown & Williamson documents in their entirety, found not only that the crime-fraud exception should apply to the documents, but that public policy alone mandates the disclosure of these documents.<sup>533</sup> Sarokin has further characterized the tobacco industry as the "king of concealment and misinformation"<sup>534</sup> and has found, in *Haines*, enough evidence to establish a prima facie showing of fraud, stating that they were deserving of at least an *in camera* review to determine the applicability of the crime-fraud exception.<sup>535</sup> Sarokin was particularly struck by the actions of the industry attorneys who assisted the tobacco companies in their selection of research projects, and their channeling of the data generated by the same, in an effort to protect the data under the attorney-client privilege and work product doctrine.<sup>536</sup> Yet, the issue of the application of the crime-fraud exception to the special project documents remains unresolved, despite Sarokin's attempts to do so in both *Cipollone* and *Haines*.<sup>537</sup>

Identical issues in relation to the Brown and Williamson documents have yet to be adjudicated in *Wyatt* and *Butler*. In *Wyatt*, efforts by Merrill Williams to have the documents published, having analyzed the documents within the scope of his employment, has remained equally futile thus far. Subject to a sweeping "gag order," Williams was unable to assert his own opinions and observations regarding the employment practices of the law firm or the contents of the documents even to his own

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530. See *supra* text accompanying note 194.

531. See *supra* text accompanying note 197.

532. See *supra* text accompanying note 203.

533. See *supra* text accompanying notes 312-15.

534. See *supra* text accompanying note 317.

535. See *supra* text accompanying notes 311-12.

536. See *supra* text accompanying note 310.

537. See *supra* text accompanying notes 278, 307, 313-315.



attorney. Thus, Williams had neither the opportunity to establish a showing of fraud sufficient to invoke the crime-fraud exception nor the ability to seek redress and defend himself against recent allegations of theft raised against him.<sup>538</sup> While denying William's requests for temporary relief from the injunction and his requests for an *in camera* review of the documents to determine the applicability of the crime-fraud exception, the trial court held that it was "safe to assume" that the documents were privileged, relying solely on testimony by Wells and the alleged existence of the confidentiality agreement.<sup>539</sup> Williams has appealed this determination.<sup>540</sup>

Finally, the court in *Butler*, as in *Haines*, found a reasonable suspicion sufficient to warrant an *in camera* review, that the cover of legal advice was used to manipulate information in furtherance of an industry wide conspiracy to hide the damaging information generated regarding the effects of smoking upon health.<sup>541</sup> Results from such an inspection have yet to be released. However, disinterested attorneys who have examined the Brown & Williamson documents assert that the industry is manipulating the work product doctrine and attorney-client privilege to serve its own purposes.<sup>542</sup> Hopefully, issues will be adjudicated fairly once and for all, so that the privilege doctrines can once again be employed for their intended use. While the issue of the applicability of the crime-fraud exception to the Brown and Williamson documents awaits proper adjudication somewhere in the judicial system and criminal investigations of the tobacco industry are ongoing by the Department of Justice,<sup>543</sup> the story told by members of the tobacco industry themselves in memoranda, minutes, research studies, the testimony of the industry lawyers and scientists, and the CTR is clearly one of concealment, not just from its opponents in litigation but from the American public.

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538. See *supra* part IV.E.2.

539. See *supra* text accompanying note 356.

540. See *supra* text accompanying note 359.

541. See *supra* text accompanying note 438.

542. See *supra* note 440 and accompanying text.

543. See *supra* text accompanying notes 441-44.

## VI. Conclusion

From the very origins of the discovery rules, ethical canons and the privilege doctrines, the societal interest in preventing crime and fraud outweigh the confidentiality between an attorney and his client. To find otherwise would violate the basic premise of our adversarial system to seek the truth. The rules and privileges are not self-effectuating; therefore, all stonewalling abuse results from attorneys' failure to employ them properly and from the courts' failure to proscribe such conduct. Thus, when such misconduct is not taken to task, there exists no incentive to comply for any party. Particularly since detection of stonewalling is often difficult, the onus of deterring such abuse lies upon the legal profession and the courts. Although there is a growing trend for increased sanctions,<sup>544</sup> they are "meaningless unless a violation entails a penalty proportionate to the gravity of the violation[.]"<sup>545</sup> such that the costs of stonewalling outweigh the benefits, particularly for these corporate defendants like the tobacco industry.

*Christine Hatfield\**

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544. See *supra* text accompanying note 76.

545. See *supra* text accompanying note 78.

\* J.D., Pace University School of Law, 1996.